
J U N E 8. 1696.

I Do Appoint *Samuel Heyrick*, and *Isaac Cleave*,
to Print the Tryal of *Ambrose Rookwood*; and
that no other Person Presume to Print the
same.

J. H O L T.

TH E Tryals of Charnock, King, and Keys,
and likewise of Sir John Friend and Sir Wil-
liam Parkins, are all Printed and sold by Samuel
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T H E
Arraignment, Tryal, and Condemnation
O F

Ambrose Broomwood,

For the Horrid and Execrable

CONSPIRACY

T O

Affassinate His Sacred Majesty King W I L L I A M,

In Order to a

French I N V A S I O N of this Kingdom.

Who upon full Evidence was found Guilty of High
Treason before His Majesty's Justices of Oyer and
Terminer, at *Westminster*, on *Tuesday* the 21st. of
April, 1696. and received Sentence the day follow-
ing. And was Executed at *Tyburn* on the 29th.
day of the said Month.

In which Tryal is contained

All the Learned A R G U M E N T S of the King's Council,
and likewise the Council for the Prisoner, upon the New
Act of Parliament for Regulating Tryals in Cases of
Treason.

L O N D O N :

Printed for Samuel Heyrick at Grays-Inn-Gate, Holborn; and
Isaac Cleave at the Star next Serjeants-Inn-Gate in Chancery-
Lane. MDCXCVI.

*Die Martis Decimo Quarto Aprilis, Anno Regni
Regis Willielmi Tertii Octavo, Annoque Do-
mini 1695.*

TH E Court being sat, at which were present the Lord Chief Justice *Holt*, the Lord Chief Justice *Treby*, Mr. Justice *Nevil*, Mr. Justice *Powell*, and Mr. Justice *Eyres*; the Court proceeded in this manner.

Cl. of Arr. Cryer, Make Proclamation.

Cryer, Oyez, Oyez, Oyez, All manner of Persons that have any thing more to do at this Sessions of *Oyer* and *Terminer*, holden for the County of *Middlesex*, draw near and give your Attendance. God save the King.

Then the Grand Jury were called over, and the appearances mark'd, and Witnesses being Sworn in Court, to give Evidence to them upon a Bill of Indictment against *Alexander Knightley*, they in a little time after withdrew to hear the Evidence.

Then the Keeper of *Newgate* was ordered to bring his Prisoners to the Bar; which he did; to wit, *Robert Lowick*, *Ambrose Rookwood*, and *Charles Cranburne*; Who were there thus Arraigned.

Cl. of Arr. Robert Lowick, hold up thy Hand. (Which he did).

Ambrose Rookwood, hold up thy Hand. (Which he did).

Charles Cranburne, hold up thy Hand. (Which he did).

You stand Indicted in the County of *Middlesex* by the Names of *Robert Lowick* of the Parish of *St. Paul Covent-Garden* in the County of *Middlesex*, Gentleman; *Ambrose Rookwood* of the same Parish, Gentleman, and *Charles Cranburne* of the same Parish and County, Yeoman; for that you, together with one *Christopher Knightley*, of the same Parish and County, Gentleman, not yet taken; not having the fear of God in your hearts, nor weighing the Duty of your Allegiance, but being moved and seduced by the instigation of the Devil, as false Traytors against the most Serene, most Illustrious, most Clement, and most Excellent Prince, our Sovereign Lord *William* the Third, by the Grace of God King of *England*, *Scotland*, *France*, and *Ireland*, Defender of the Faith, &c. your Supreme, True, Rightful, Lawful, and Undoubted Lord, the cordial Love, and true and due Obedience, Fidelity and Allegiance, which every Subject of our said Lord the King that now is, towards him our said Lord the King should bear, and of right ought to bear, withdrawing and utterly to extinguish, intending and contriving, and with all your strength resolving, designing, and conspiring the Government of this Kingdom of *England*, under him our said Sovereign Lord the King that now is, of Right, duly, happily, and well established, altogether to subvert, change, and alter, as also our said Lord the King to death and final destruction to put and bring, and his faithful Subjects, and the freemen of this Kingdom of *England*, into intolerable and most Miserable Servitude to *Lewis* the *French* King to Subjugate and Inthral, the 10th day of *February*, in the Seventh year of the Reign of our said Sovereign Lord the King that now is, and divers other days and times as well before as after, at the Parish of *St. Paul Covent-Garden*, aforesaid, in the County aforesaid, falsely, maliciously, devilishly, and

traiterously, did compass, imagine, and contrive, resolve, design and intend, our said Lord the King that now is, to kill, slay, and murther, and a miserable slaughter among the faithful Subjects of our said Lord the King, throughout this whole Kingdom of *England*, to make and cause, and the same your most impious, wicked, and devilish Treasons, and Traiterous compassings, contrivances, and purposes aforesaid, to fulfil, perfect, and bring to effect, you the said *Robert Lowick*, *Ambrose Rookwood*, and *Charles Cranburne*, together with the said *Christopher Knightley*, and very many other false Traytors, to the Jurors unknown, afterwards (to wit) the same 10th day of *February*, in the year above-said, at the Parish aforesaid, in the County aforesaid, and divers other days and times, as well before as after, there, and elsewhere in the same County, falsely, maliciously, advisedly, secretly, and traiterously, and with force and arms did meet together, propose, treat, consult, consent, and agree, him our said Lord the King that now is, by lying in wait and guile, to Assassinate, Kill, and Murther, and that execrable, horrid, and detestable Assassination and Killing, the sooner to execute and perpetrate, afterwards (to wit) the same day and year, and divers other days and times, at the Parish aforesaid, in the County aforesaid, traiterously did treat, propose, and consult, of the ways, manner, and means, and the time and place, where, when, how, and in what manner, our said Lord the King, so by lying in wait, the more easily you might Kill; and did consent, agree, and assent, that forty Horsemen, or thereabouts, whereof the said *Christopher Knightley*, you the said *Robert Lowick*, *Ambrose Rookwood*, and *Charles Cranburne*, should be four; and every one of you traiterously took upon himself to be one, with Guns, Muskets, and Pistols, charged with Gunpowder and leaden Bullets, and with Swords, Rapiers, and other Weapons, being Armed, should lie in wait, and lie in Ambush, our said Lord the King in his Coach being, when he should go abroad, to Invade, and that a certain and competent number of those men, so Armed, should set upon the Guards of our said Lord the King then attending him, and being with him, and should fight with them, and overcome them, whilst others of the same men so Armed, our said Lord the King should Assassinate, Slay, Kill, and Murther, and you the said *Robert Lowick*, *Ambrose Rookwood*, and *Charles Cranburne*, together with the said *Christopher Knightley*, the Treason, and all the Trayterous Intentions, Designs, and Contrivances aforesaid, to execute, perform, fulfil, and bring to effect, afterwards (to wit) the aforesaid Tenth day of *February*, in the Seventh year above-said, at the Parish aforesaid, in the County aforesaid, divers Horses, and very many Arms, Guns, Pistols, Swords, Rapiers, and other Weapons, Ammunition, and Warlike things, and Military Instruments, falsely, maliciously, secretly, and traiterously did obtain, buy, gather together, and procure, and cause to be bought, obtained, gathered together, and procured with that Intention, then in and about the detestable, horrid, and execrable Assassination, Killing, and Murder of our said Lord the King that now is, as aforesaid to be used, employ'd, and bestow'd; and the same Premises the more safely and certainly to execute, do and perform, the aforesaid *Christopher Knightley*, with one *Edward King*, late of High-Treason in contriving and conspiring the death of our said Lord the King that now is, duly Convicted and Attainted, by the consent and agreement of divers of the Traytors and Conspirators aforesaid, the said 10th. day of *February*, in the

the 7th. year abovesaid, went and came to the place proposed, where such intended Assassination, Killing, and Murder of our said Lord the King by lying in wait, should be done, performed, and committed, to see, view, and observe the convenience and fitness of the same Place for such lying in wait, Assassination and Killing, there to be done, performed, and committed: And that Place being so viewed and observed, afterwards (*to wit*), the same day and year, their Observations thereof to several of the said Traytors and Conspirators did relate and impart, (*to wit*) at the Parish aforesaid, in the County aforesaid: And you the aforesaid *Charles Cranburne*, the same day and year there, in order the same execrable, horrid, and detestable Assassination and Killing of our said Lord the King by the Traytors and Conspirators aforesaid, the more readily and boldly to execute, perform, and commit, advisedly, knowingly, and traiterously did bring and carry between divers of those Traytors and Conspirators, forward and backward, from some to others of them, a List of the Names of divers men of those who were designed and appointed our said Lord the King so as aforesaid by lying in wait to kill and murder; against the Duty of the Allegiance of the said *Christopher Knightley*, you the said *Robert Lowick*, *Ambrose Rookwood*, and *Charles Cranburne*, and against the Peace of our said Lord the King that now is, his Crown and Dignity, and against the form of the Statute in such case made and provided. —

How say'st thou, *Robert Lowick*, Art thou Guilty of the High-Treason whereof thou standest Indicted, or Not Guilty?

Lowick. Not Guilty.

Cl. of Arr. Culprit, How wilt thou be Try'd?

Lowick. By God and my Countrey.

Cl. of Arr. God send thee good deliverance. How say'st thou, *Ambrose Rookwood*, Art thou Guilty of the High-Treason whereof thou standest Indicted, or Not Guilty?

Rookwood. Not Guilty.

Cl. of Arr. Culprit, How wilt thou be Try'd?

Rookwood, By God and my Countrey.

Cl. of Arr. God send thee good deliverance. *Charles Cranburne*, How say'st thou? Art thou Guilty of the High-Treason whereof thou standest Indicted, or Not Guilty?

Cranburne. Not Guilty.

Cl. of Arr. Culprit, How wilt thou be Try'd?

Cranburne. By God and my Countrey.

Cl. of Arr. God send thee good deliverance.

Cranburne. My Lord, I desire your Lordship would grant me the favour for my Wife to come to me in private, and that I may have Pen, Ink, and Paper.

L. C. J. Holt. Pen, Ink, and Paper, you must have; but as to the other, we must consider of it. Keeper of *Newgate*, What has been usual in those cases?

Keeper. My Lord, we let no body come to them in private, but their Council.

L. C. J. Holt. That's provided for by the Act that allows them Council: But has it been usual heretofore to permit any body else to be with them in private; the Wife, or any other Relations?

Keeper. It has not.

L. C. J. Holt. It is very dangerous if it should; therefore let him have his Wife come to him in the presence of the Keeper.

Cran-

Cranburne. And Pen, Ink, and Paper, I hope, my Lord?

L. C. J. Holt. Yes, yes, that you shall have.

Cranburne. You don't deny me, my Lord, that I may have my Wife come to me?

L. C. J. Holt. No, we don't, but she must not be in private with you, for fear of an Escape.

Rockwood. I beg the same favour, my Lord, to have my Brother come to me, and Pen, Ink, and Paper.

L. C. J. Holt. You shall have the same Rule; but you, Keeper, must have especial Care who you do permit to come to them, and be private with them; for it is still at your Peril if any ill Accident happens by your Indulgence to them: And yet it is fit they should have all that is reasonable for preparing for their Defence at their Trials.

Lowick. And I desire, my Lord, I may have my Sister come to me, and the liberty of her being in private with me.

L. C. J. Holt. Your Friends may come to you at seasonable times, in the presence of the Keeper; you shall have any thing that is reasonable, but the Safety of the Government must be look'd after. Therefore, Keeper of *Newgate*, take back your Prisoners, and bring them here this day sevensnight at 7 a Clock in the Morning, without any other Order.

They staid at the Bar about Half an hour, the Judges consulting among themselves about the Precept for the Petty Jury upon a late Act of Parliament which has appointed six days for the Jury to be summon'd before they appear to try any Cause, and upon the last Act in Regulating Tryals in Cases of High-Treason; which requires that the Prisoner shall have a Copy of the Pannel of the Jury duly return'd, at least two days before his Tryal.

Then the Prisoners were carried away; and the Grand Jury withdrew to consider of the Evidence against *Knightley*, and in a Quarter of an Hour came back, and being called over, delivered in a Bill to the Court.

Cl. of Arr. Gentlemen, you are content the Court shall amend Matter of Form, or False *Latin* in this Indictment, without altering any Matter of Substance without your Privy.

Jury. Yes.

Cl. of Arr. Then, Gentlemen, you may go for this time; and you are to take notice, if there be occasion at any time to call you together, you shall have sufficient warning given you beforehand. This is *Billa Vera* against *Alexander Knightley* for High-Treason.

Then the Judges resumed the Debate among themselves, and at last resolved that there should go three several *Venires* for the Petty-Jury, returnable this day sevensnight; one to try between the King and *Robert Lowick*, the second to try between the King and *Ambrose Rookwood*, and a third between the King and *Charles Cranburn*; because, though the Indictment be against them jointly, yet it was a several Offence in every one of them, and they might sever in their Challenges, and that would be troublesome, and therefore it was thought best to sever them in their Tryals; and therefore the Court adjourned for an Hour or something more, while the Precepts for the Jury were preparing, and according to the Adjournment met, and signed and sealed the Precepts, and then Adjourned the Sessions of *Oyer* and *Terminer* until this day sevensnight, at seven in the Morning.

*Die Martis Vicesimo primo Aprilis, Anno Regni Regis Willielmi
Tertii Octavo, Annoq; Dom. 1696.*

THE Court sat about Eight a Clock, at which were present a great Number of Noblemen, and Persons of Quality who were in the Commission, and Seven of the Judges; to wit, the Lord Chief Justice *Holt*, the Lord Chief Justice *Treby*, the Lord Chief Baron *Ward*, Mr. Justice *Nevile*, Mr. Justice *Powel*, Mr. Justice *Eyres*, and Mr. Baron *Powis*.

Cl. of Ar. Cryer, Make Proclamation.

Cryer. O yes, O yes, O yes. All manner of Persons that have any thing more to do at this Sessions of *Oyer and Terminer*, Adjourned over to this Day, draw near and give your attendance. And God save the King.

Cl. of Ar. Cryer, Make Proclamation.

Cryer. O yes, Sheriffs for the County of *Middlesex* return the Precepts to you directed, upon Pain and Peril will fall thereon.

The Under Sheriff returned the Precepts.

Cl. of Ar. Mr. *Baker*, pray, Who do you intend to begin with?

Mr. Baker. With *Ambrose Rookwood*.

Cl. of Ar. Cryer, Make Proclamation.

Cryer. O yes, You good Men of the County of *Middlesex* Summoned to appear here this Day to try between our Sovereign Lord the King, and the Prisoners that are, and shall be at the Bar, Answer to your Names as you shall be called, every one at the first Call, and save your Issues.

The whole Pannel was called over, and the Appearances of those that answered Recorded; and the Defaulters were again called over.

Cl. of Ar. Keeper of *Newgate*, Set *Ambrose Rookwood* to the Bar. (Which was done.) You the Prisoner at the Bar, *Ambrose Rookwood*, those Men that you shall hear called, and Personally appear, are to pass between our Sovereign Lord the King and you, upon Tryal of your Life and Death; if therefore you will Challenge them, or any of them, your time is to speak unto them as they come to the Book to be Sworn, before they be Sworn.

Sir B. Shower. If your Lordship pleases, We have a Doubt or two to propose to your Lordship, in respect of the Tryal this Day: But before I offer it, we beg your Favour for a Word in behalf of our selves.

My Lord, We are Assigned of Council, in pursuance of an Act of Parliament, and we hope that nothing which we shall say in Defence of our Clients, shall be imputed to our selves. I thought it would have been a Reflection upon the Government and your Lordships Justice, if being Assigned we should have refused to appear; 'twould have been a Publication to the World, That we distrusted your Candour towards us in our future Practise upon other Occasions. But, my Lord, there can be no reason for such a Fear, I am sure I have none; for we must acknowledge, we who have been Practisers at this Bar especially, that there was never a Reign or Government within the memory of Man, wherein such Indulgence, such easiness of Temper hath been shewn from the Court to the Council, as there always hath been. Never was there such freedom and liberty of Debate and Argument allowed to the Bar, and we thank your Lordship for the same.

My Lord, We come not here to countenance the Practises for which the Prisoner stands Accused, nor the Principles upon which such Practises may be presumed to be founded; for we know of none either Religious, or Civil that can Warrant or Excuse them. But the Act of Parliament having warranted the appearing of Counsel for Persons Accused to make Defence for them, we hope your Lordship will give us leave to make what Objections we can on their behalf.

L. C. J. Holt. Look ye, Sir *B. Shower*, go on with your Objections; let us hear what you have to say.

Sir B. Shower. My Lord, It appears to be a Doubt to us, upon this Act of Parliament, whether this Cause can be tryed this Day: And if it be a Doubt, we hope, though it should not have that weight with the Court, that we apprehend it has; yet your Lordship will excuse us, and settle it according to your Judgment. The Act requires, That all that shall be Accused and Indicted for High-Treason, whereby any Corruption of Blood may, or shall be made to any such Offender or Offenders, or to any the Heir or Heirs of any such Offender or Offenders, or for Misprision of such Treason, shall have a true Copy of the whole Indictment; and afterwards shall have Copies of the Pannel of the Jurors who are to try them, duely Returned by the Sheriff and delivered unto them. And every of them so Accused and Indicted respectively two Days at the least before he, or they shall be Tryed for the same. Now if your Lordship will please to cast your Eye upon this *Venire Facias*, and it will appear to be Returned but this Day, and that is not according to the intent of this Law. And it is impossible then, if it be as we apprehend it, and put it, that this Tryal should go on at this time, and that this Construction should be so as we say; not only the Words, but, as we take it, the Intent and Meaning of the Act of Parliament too are for us, that there ought to have been a Copy of the Pannel after the Return two Days before the Tryal. For in the first place, My Lord, the Words are plain; It must be a Copy of the Pannel duely Returned by the Sheriff. Now though it be a Copy of the Array of the Pannel which we have delivered to us, yet it is not a Copy of the Pannel of the Jurors Returned; for it is no Return till it come into Court. And the King's Counsel must admit, that in the Case of all Writs Returnable, it cannot be said that there is a Return, where there is a Writing upon the back, or a Label annexed, till it be actually Returned into Court. As in the Case of a *Fieri Facias*, or a *Mandamus*, an Action for a false Return cannot lye, till the Writ be actually Returned. For such Action must be brought into the County of *Middlesex*, where the Court resides, before whom the Return is made, and not in the County where the Sheriff lived that made the Return; for it is not a Return till filed in Court. Now here the Words of the Act are; *He shall have a Copy of the Pannel of the Jurors who are to try him, duely Returned by the Sheriff two Days before the Tryal.* Now we humbly insist that the Words duely Returned must be antecedent to the having the Copy, or else he cannot be said to have a Copy of the Pannel duely Returned. The Act of Parliament does not say which shall be duely Returned; and therefore there does arise a Doubt, whether your Lordship will not direct us to have a Copy after the Return made, which is but this Day.

Mr. Phipps. If your Lordship pleases to spare me a Word of the same side: We take it, that by this Act of Parliament the Jury must be duly returned before the Pannel is delivered to us. Now the Return is the Answer that is Indorsed upon the Writ with the Pannel annexed, and delivered

delivered into Court; for the Return is to the Court, and till it be delivered into Court, it cannot properly be said to be a Return. We acknowledge the Copy of this Pannel has been delivered unto us two or three Days ago. But the *Venire* being not returned till to Day, we think we have not a Copy of the Pannel within the intent of, and according to the Act of Parliament. And I desire to put your Lordship this Case: This Act of Parliament does likewise provide, that the Prisoner should have a Copy of his Indictment five Days before his Tryal, to enable him to consult with his Council how to plead and defend himself; suppose then a Copy of a Bill that is intended to be presented to the Grand Jury, be delivered to the Person accused five Days before the Grand Jury are to meet, and they afterwards meet, and find it, and the Party is brought immediately, and arraign'd upon it: This is a true Copy of the Indictment, yet certainly the intent of the Act of Parliament is not answered, for it was not a true Copy of the Indictment at the time it was deliver'd. And I take this Case to be under the same reason. This is not a Pannel duely returned, till now; and therefore by consequence we have not that Advantage that this Act of Parliament intended to give us; for which reason we humbly apprehend we ought not to be tryed to Day; which we submit to your Lordship.

L. C. J. Holt. What say you to it, Mr. Attorney.

Mr. Att. Gen. My Lord, with submission, this Objection will receive a very plain Answer. If I understand it aright, they say that they ought to have a Copy of the Pannel after it is returned, and that it cannot be said to be duly delivered, according to the Provision in this Act of Parliament, till after the *Venire facias* be duly returned into the Court, and then they are to have it two Days before they are tryed. They say the *Venire facias* is returned but to Day, and so the Copy delivered to them, is not pursuant to the Act of Parliament; and so they cannot be tryed to Day: This I take to be the Objection. But with Submission, My Lord, it will be plain both by the Words of the Act, and the Reason and Intention of it, that there is no Occasion at all, nor no Necessity of having the Writ returned before the Copy of the Pannel be delivered. The Words of the Act of Parliament are these; *That every Person and Persons who shall be accused, indicted, and tried for Treason, or Misprision of Treason, after the 25th. of March, 96, shall have Copies of the Pannel of the Jurors who are to try them, duly returned by the Sheriff, and delivered to them two Days before they be tryed.* Now first, My Lord, I think it is apparent what the Meaning and Design of the Act of Parliament was, that the Prisoner should know two Days before the Tryal, who were the Jury that were to pass upon him, that he might have an Opportunity to consider how he should make his Challenges as he thought fit, and time to enquire into the Qualifications of them, that if there were any particular ground of Challenge, he might not lose that Benefit; so that if he has a Copy of the Pannel array'd by the Sheriff, which is afterward returned by the Sheriff into Court, and there is no variation of that Pannel afterwards; then certainly the End and Intent of the Act is entirely pursued; for by that means the Prisoner has the Names of all the Jury returned, and are afterwards called, and has a full Opportunity of making such Challenges as he thinks fit. And as the Reason and Intent of the Act is answered by this Construction, so the very Words of the Act are answered: For it is not said in the Act, that he shall have a Copy of the Pannel after it is return'd, but it is said a Copy of the Pannel duely returned

turned by the Sheriff; that is, when the Sheriff has arrayed a Pannel, then he is to have a Copy of that Pannel; and if afterwards the Sheriff return the same Pannel into Court, is not this a Copy of the Pannel duly return'd? With Submission it is, and sufficient to answer both the Words and Intention of the Act of Parliament. It is true, *My Lord*, if the Act of Parliament had said he shou'd have a Copy of the Pannel after it was return'd, then we cou'd not have said but that the Objection wou'd hold. But when the Words are general, and it is most reasonable to be interpreted that the Copy is to be delivered when the Array is made, because that answers the Intent and End of the Act of Parliament, which was to enable the Prisoner to make his Challenges, we take that to be sufficient; and if another Interpretation shou'd be made, it wou'd render the Tryal in such Cases liable to all the Mischiefs in the World, and make it impracticable that any Person shou'd be try'd; at least it wou'd introduce a new Method of Proceedings that never was practised, nor ought to be introduced, unless this Act of Parliament by express Words, had appointed and constituted such a new Method; and we suppose your Lordship will never make any such Construction, that the Act intended a new Method, unless expressly declared; for if it were, as they would have it, that the Copy of the Pannel was not to be delivered till after the return of the Writ, then the Prisoner cannot be tryed upon the return of the Writ; for upon the return of the Writ, the Jury must be brought to the Bar, the Prisoner must be brought to the Bar, and adjourned over to a further time, that in the mean time a Copy may be delivered to them. I believe that they can never show any President that there was such an Adjournment of a Jury of Life and Death, over to another Day, for a Person to have a Copy of the Pannel, to enable him to his Challenges; and either that must be the Consequence, or else the Jury must not come upon the return of the *Venire facias*, but there must go a *Habeas Corpora*, and the Prisoner tryed upon that *Habeas Corpora*: For first there must be the return of the Writ, then the Copy of the Pannel delivered, then the *Habeas Corpora* returnable another Day; and upon that the Tryal must be had: But I believe there can be no Instance given of a Tryal for Treason upon a *Habeas Corpora*. Now if the Parliament had intended that they wou'd not have the Copy of the Pannel deliver'd till after the return of the *Venire facias*, they would certainly have exprest and provided how the Method of Tryal should have been; that is, that either the Jury should have been adjourn'd over till another Day, or else brought to the Bar upon a *Habeas Corpora*; which is the only way that can be thought of. Indeed, *My Lord*, I do agree, that if the Sheriff should give a Copy of the Pannel, and afterwards should vary that Pannel, tho' but in one Name, that would not answer the End of the Act of Parliament, because the Prisoner is deprived of the opportunity of knowing the Name of the Person that he so altered, in order to his making his Challenges against him: But if the Sheriff do return the same Persons that are in that Copy delivered to the Prisoner, then we do to all Intents and Purposes, answer the End of the Act of Parliament, and avoid the absurd Construction that they would make of this Act for the Changing the Method of Tryals, and no body can well tell what Method shou'd be pursued: But certainly if the Act of Parliament intended a new Method shou'd be pursued, they wou'd have describ'd and settled what it shou'd be.

Mr. Soll. Gen. If your Lordship pleases to spare me a word of the same side; my Lord this is an Objection that has been foreseen, and I think has been prevented, for with Submission I take it the Act has been sufficiently answered both as to the words, and as to the intent of it in the Prisoners having the Copy of the Pannel before the Jury be returned, there must be such a thing as a Pannel array'd before the Jury be summoned, and therefore it is sufficient that the Prisoner have a Copy of that Pannel so many days before his Trial; which was only intended for that particular reason, that he might be provided sufficiently to make his Legal Challenges. Certainly within the Intent of the Act of Parliament it is well enough if he had but a Copy of the Pannel two days before the return of the Writ, provided the Jury was not altered that was array'd, nor any other Names put in but those that he had a Copy of before; now my Lord I think this Act of Parliament must be taken according to the intent and meaning of it, or else it will bear hard upon the Prisoner, and harder sure than it was designed it should: this Act says, he shall have a Copy of his Indictment so many days before his Trial; now I would fain know whether they would have it construed, that the Copy does not need to be delivered till after Issue joyn'd, which must be if their Doctrine hold true, that the Act is to be construed according to the strict Letter of it, for Trial is the Trial of the Issue; what if the Indictment be delivered five days before the Trial, tho after Issue joyn'd, it is well enough according to such an Exposition, for the arraignment of the Prisoner is no part of the Trial, and yet it was the intent of the Parliament that he should have a Copy of the Indictment 5 days before he was arraigned, and that for this reason, because he might have several Pleas to plead and Objections to make before he pleaded the General Issue; he might have Pleas in abatement, which after Plea pleaded of Not guilty he could not have the advantage of, nor could he afterwards move to quash the Indictment, which he might otherwise have good reason for, if he had the Copy before he was put to plead; so that I take it the Act is to be interpreted every where according to the intention of it, and the Prisoner at the Bar according to the intention of the Act, has had a Copy of this Indictment 5 or 6 days before his Arraignment, and therefore we have acted according to the purpose and meaning of the Parliament, and likewise he has had a Copy of the Pannel of the Jurors that are to try him, which is duly returned by the Sheriff, which is likewise according to the Act of Parliament: as for what they say that even a Copy of the Indictment before it be found would not be good according to this Act; that's true, but the case is not the same, nor the reason of the Case alike between that and the Pannel of a Jury, because it is sufficient in Law to make it a good Pannel if it be array'd by the Sheriff before the Jury be summoned, for the Sheriff must array and compleat his Pannel to let his Bailiff know who must be summoned, but in the case of an Indictment, tho a Bill be first form'd by the Clerk, yet it is not look'd upon as a formal Indictment in point of Law till it be found by the Jury as their Verdict and preferred to the Court, and it is not necessary that the Indictment should be formed for the Jury before they find it, for they are properly to make their own presentments themselves; and the ancient practice was, that they only presented the Fact, and the Matter was put into form afterwards by the Court, and in

many cases it is so at this day, as we have had some instances lately ; but as to the arraying of a Pannel it always was so, and always must be so array'd by the Sheriff before the Jury summoned, and there's the difference between the giving a Copy of an Indictment and the Copy of a Pannel, the one is taken notice of in point of Law to be necessary, the other is not. This giving a Copy of the Pannel, my Lord, we say is within the intent of the Act, which was only to enable persons accused to make their just Challenges, and that they may as well do when a Copy is delivered after it is array'd by the Sheriff, as when it is return'd by the Sheriff, and being so done with submission it is well done within the words, and within the intent of this Act of Parliament.

Mr. Conyers. My Lord, the words of this Act of Parliament are, that they shall have a Copy of the Pannel of the Jurors who are to try them duly returned by the Sheriff and delivered to them, and this 2 days before the Trial : My Lord, that this is the Pannel of the Sheriff of the Jurors that are to try them as soon as it is array'd has been observ'd already, now it would be a forc'd construction to construe these words that follow, duly returned by the Sheriff, to be meant, that a Copy should be delivered after the Jury is returned, because that would be a delay of Justice, and keeping off the Trial longer than was intended by this Act of Parliament, and more than will answer the end of this Law, for the end of it was to give the Prisoner all benefit and advantage of Exceptions against any of those that were to try him, and if he has this Pannel two days before his Trial, he has that benefit the Law intended him : Now my Lord as to what has been said of an Indictment, which by this Law he is to have a Copy of too, that is plainly quite another case, for it is not an Indictment till it be found, and so answers not the words nor intention of the Act till found by the Grand Jury, till then it is not a Copy of his Charge, and therefore by no construction can it be called a Copy of the Indictment. I think I need not trouble your Lordship any further in this matter, because this Objection was foreseen, and has been already considered of by the Court upon the Prisoners arraignment.

Sir B. Shower. My Lord, in answer to what Mr. Solicitor has said, that there is as much reason to expect that the Copy of the Indictment should not be delivered till after Plea pleaded, as that the Pannel should not be delivered till after the Jury return'd, because in the case of the Indictment it is said so many days before the Trial, and the Trial cannot be till Issue joyn'd, there can be no weight in that Objection at all ; for the words of the Act are quite differently penned in the case of the Indictment, from what they are in the case of the Pannel, for tho it be said it should be done 5 days before the Trial, yet it is added, in order to the advising with Counsel how to plead, which must be before Plea pleaded, and therefore it must be absolutely necessary to be done before the arraignment. My Lord, I have propos'd my doubt, it may have consequences on the one side and the other, we submit intirely unto your Lordships Judgment, it is a new Law, and never has received any opinion ; the words of it are duly return'd by the Sheriff, and the Question is, whether a Copy of the Pannel upon the Array before it be return'd be a Copy of the Pannel duly return'd, tho the same Pannel be afterwards duly returned.

Mr.

Mr. *Phipps*. My Lord, Mr. Attorney General owns, that the Pannel after it is arrayed may be amended and altered by the Sheriff, and it was never intended by this Act of Parliament, that any Copy of the Pannel should be delivered to the Prisoner but of those Men that were really returned, so that we take it we ought to have it two days after the Return and before the Trial, for certainly it must be a Copy of the Men returned, which if the Sheriff may alter at any time before the Return, the Intent of the Act of Parliament can never be answered by any Copy but what is a true Copy of the Return. Mr. *Conyers* would answer the Objection that I made about a Copy of the Indictment by this, that it is not an Indictment till it be found by the Jury, but I think it is no Answer to our Objection at all, tho it be but a Copy of the Bill intended to be presented to the Grand Jury, yet if the Grand Jury afterwards find it is as true a Copy of the Indictment, as this is a Copy of the Jury intended to be Returned, and afterwards Returned. As to what they say, that this will Introduce a new method of Tryal, contrary to all form or proceedings, that can be no Objection neither; for if it be so, we can't tell how to help it, the Parliament have thought fit to have it so, and we must submit to take it as the Law has made it: If there be a necessity for a *Habeas Corpora* upon the provision made in this Act, so it must be, for we must take the Law as it is. We submit our Objection to your Lordship; we think we have not had the benefit of this Law.

Mr. *Cowper*. Surely, my Lord, what Mr. *Phipps* has now said has no weight in it; that because the Sheriff had it in his power to alter the Pannel before it was Returned, that therefore this is not now a true Copy of the Pannel of the Jurors who are to try the Prisoner, duly returned by the Sheriff; which are the words in the Act. It is true, if the Sheriff had in fact altered the Pannel from what it was, and return'd it so altered into Court, no doubt of it the Prisoner would be very well intitled to make this Objection, that he had not a Copy of the Pannel, or the Names of the Jurors that were summoned to try him; but now we can aver, that we have pursued this Act of Parliament literally; for in answer to their Objection, we may ask this Question of them upon the words of the Act, Have you not had a true Copy of the Names of those that are to try you, and are duly returned by the Sheriff for that purpose; and was not that Copy delivered unto you above 2 days ago? They cannot say they have not had it so, and if they cannot say so, then both the Words and Meaning of the Act of Parliament are in every respect answered; if when the Jury come to be called the Prisoner finds the Pannel to be altered, he has reason to object, and will have the benefit of the Objection, that he has not that advantage which the Law intended him, but till that prove to be the Fact, we think here is a full Compliance with this Law.

Mr. *Soll. Gen.* Sir *Barth. Shewers* mistakes my Objections about the Copy of the Indictment, for we say, if the intent of the Act of Parliament be complied with, it is sufficient, especially where the words are any way doubtful; according to the Words of this Act of Parliament a Copy of the Indictment need to be delivered but 5 days before the Trial; but it appearing that the intention of these Law-makers was, that he should have a Copy of the Indictment to enable him to plead to it if he had cause, therefore tho the words

words be before the Trial, we have taken it that he should have a Copy 5 days before his Arraignment, and so we have complied with the meaning of the Law in that point, as we have also in this, which was, we take it, only to enable the Prisoner to make his Challenges, and if that be done 2 days before his Trial with submission it fully answers this Law.

L. C. J. Holt. Have you done Gentlemen?

Counc. Yes, my Lord.

L. C. J. Holt. Then look you Sir *B. Shower*, as to this point that you now insist upon, we have had it under consideration heretofore; we were here this day seven-night, and then we did consider in what method we should proceed, so that the Prisoner might have the benefit intended him by this Act of Parliament: the Act of Parliament does design in the first place, that every Prisoner that is to be tried for High Treason should have a Copy of his Indictment, at least 5 days before the Trial, that I think was all that the makers of this Act of Parliament intended at the first; but then there being subsequent words, which shew the reason why they gave him the Copy so long before the Tryal; which is, that he might advise with his Council what to plead; these words we conceive has given the Prisoner a further time than what was originally intended, therefore we have thought it necessary that the Prisoner should have a Copy of his Indictment 5 days before he be arraigned, which is 5 days before he was put to plead; and your Client, the Prisoner at the Bar, has had the benefit of this Act in that respect before we arraigned him; then after he has pleaded, the Question was, when he was to have a Copy of the Pannel: Now the design of this Act of Parliament was, That the Prisoner should have a Copy of the Pannel 2 days before his Tryal, in order that he might consider of the persons that were to Try him; that he might inform himself of their Qualities, Tempers, and Dispositions; that so he might make use of the benefit the Law gives him of challenging Five and Thirty without shewing any cause if he did not like the Men, and as many more as he should think he had good cause to challenge: now in this Case the whole design of this Act of Parliament is answered, for he has had a Copy of the Pannel, as you your selves acknowledge, 2 days before the day of his Trial, so that he has the full benefit that the Act of Parliament intended; he is by this Copy as well enabled to make his Challenges as the Law design'd he should be, and has had the same time allowed him that the Act of Parliament meant he should have, then supposing the design of this Act of Parliament be fully answered and complied with in the Case. The next Question is, whether the words of the Act are satisfied, for we would be very loth, in a Case of this nature, where an Act of Parliament intends a favour to a Prisoner that stands at the Bar for his Life, to abridge him of any part of that favour which the very words of the Act would allow him, tho the Intent of the Act of Parliament were answered otherwise: now in the first place it is observable, that the Act of Parliament does not say, that the Prisoner shall have a Copy of the Return, nor does it say, he shall have a Copy from the Court, but he shall have a Copy of the Pannel of the Jurors duly return'd that are to try him, now if the Sheriff array his Pannel

Pannel several days before the Tryal upon the *Venire faciat*, and does give him a Copy of that very Pannel, which Pannel is afterwards returned in Court. Has not he then a Copy of the Pannel duely returned ? Does not this answer all the words of the Act ? For you yourselves say that it is not said in the words of the Act that the Copy shall be delivered after the Pannel returned, nor does their need a Copy of the very Return. Surely we must not carry it farther than the words if the meaning be complied with, and we think this answers both words and meaning ; It is a Copy of the Pannel, and a Copy of that Pannel that's duely returned. Now to make another construction would indeed not only alter the usual course of Tryals, but be contradictory to the very Process it self. We are by the Course of Law to award Process to Summon a Jury to appear at a certain time, to try the Issue joyned between the King and the Prisoner ; and yet when we have done this, and the Jury thereupon are summoned and appear, they may go as they came, for the Issue cannot be tryed, because after the Return, the Prisoner must have a Copy of the Pannel two days before he can be tryed. I do think the design of the Act of Parliament, and the very word of the Act are fully satisfied in giving a Copy of the Pannel two days before the Return. We had this matter under our Consideration before, and upon Debate among our selves, we did think fit to award the Precept returnable this day, and resolved to try the Prisoner this day unless better reasons were offered us to alter our opinion, and we are not satisfied that any such better reason has been given, but that this Tryal ought to go on, the Prisoner having the full benefit that was designed him by this Act of Parliament. And the giving a Copy of the Pannel that is returned, tho before the return sufficiently satisfies the words of the Act, no other construction can be made without great absurdities : This is my opinion.

Sir B. Shower. My Lord, I hope we shall be excused for our Clyent, we have another Doubt to propose to the Court.

L. C. J. Holt. You have had my Opinion upon this point, if my Lords and Brothers are of another Opinion they will tell you.

Judges. No my Lord, we are all of the same Opinion.

L. C. J. Holt. My Lord Chief Justice of the Common Pleas, and my Brothers are all of the same Opinion.

Sir B. Shower. My Lord, we say we have another Doubt to propose upon this Act of Parliament : It is a new one, and never put in practise till now, and therefore we hope your Lordship will please to excuse us if we offer our Objections, because there has yet never been a determination about it, and we are assigned of Counsel by your Lordship.

L. C. J. Holt. Never make Apologies Sir Bartholomew, for it is as Lawful for you to be of Counsel in this Case, as it is in any other Case where the Law allows Counsel. It is expected you should do your best for those you are assign'd for, as it is expected in any other Case that you do your Duty for your Clyent.

Sir B. Shower. My Lord, our Exception is this, we say that this Tryal cannot go on at this time upon this Act of Parliament, because we have no true Copy of the whole Indictment, it does not appear in the Copy we have delivered to us before whom it was taken,

or whether it was taken at all, or in what place it was taken ; it says only *Middlesex* in the Margent, and then *Juratores pro Domino Reges presentant*, That might be before the Justices of the Peace at the Quarter-Sessions, or it might be at the Monthly-Sessions at *Hicks-Hall* ; or it might be at the Sessions at the *Old-Baily* ; or it might be before Commission of *Oyer and Terminer*, as perhaps it really was, but *non Constat* where it was taken, nor how it comes hither : It might be before your Lordship here as we believe it was, but this Copy not letting us know where and how it was taken, we think we have not the benefit of this Law, for the Party accused is by this Act of Parliament to have a Copy to advise with Counsel, that he may be enabled to plead : And that is the reason why the words of this Act are so Pen'd, that he shall have a Copy of the whole Indictment, which we cannot plead to unless we know where it was taken, if we should have occasion to plead any Special Matter. And besides my Lord, there is another reason why we should have the whole Indictment to enable us to plead, because if we had the *Caption*, it might perhaps appear that the Indictment was taken before the time of the Fact alledg'd in the Indictment, and then that would make it Vitious ; it might be before the 9th of *February*, when this Treason is said to be committed, and then we ought not to be brought to Tryal. Now the Design of this Act of Parliament, in giving the Prisoner a Copy of the Indictment so long before the Tryal, was not only to enable him to make his Defence upon the Tryal, but also to advise with Counsel to plead, for so the words are the better to enable him to plead. Now we say to answer this end, it is necessary we should have a Copy of the whole Indictment, as it stands before your Lordship in Court. And another reason is this, it is no Indictment, unless it be presented by the Jury, as their Inquisition upon Oath unto some Court that has Jurisdiction of the matter : What we have delivered to us is only a Copy of a Bill, as to be delivered to a Grand Jury, to be found *non Constat*, that it is found. Now the intent of the Act of Parliament being to give the Prisoner this advantage to enable him to plead, he may have several pleas, of which he might take a legal advantage if he had a Copy of the whole, which he knows not how to come at : now and intruth it is very necessary, because if he be tryed upon an Indictment found in another Country, then these Commissions have not a legal authority to try him ; and if the Tryal should go on, and he be acquitted, he is subject to be Indicted and tryed again, and never can releive himself by the acquittal upon such an Indictment before persons that had no authority to try him. I doubt he can never plead the acquittal, because he cannot make out that he was duely try'd and acquitted ; and for these Reasons we humbly submit it to your Lordship, whether we have had the benefit of this Law, in having a Copy of the whole Indictment to enable us to plead : And if we have not, till we have that benefit, we humbly Conceive this Tryal ought not to go on.

Mr. *Phipps*.— My Lord, the Question is whether the Stile of the Court, the persons before whom it was taken, and to whom the presentment is made ; the time when it was taken, and the place where ought not to appear in the Indictment. This Law requiring that the Prisoner

Prisoner should have a Copy of the whole Indictment to enable him to plead; for if it should happen that the Indictment was taken before persons that had no Jurisdiction, then I believe it will not be denied but that the Prisoner might plead to the Jurisdiction, and there might be several other Pleas that he might take advantage of, I would desire to know of the King's Counsel, whether ever they saw a Copy of an Indictment given in Evidence, or pleaded without the *Caption*. It is not a true Copy without it, there ought to be the time, the place, and the stile of the Court before whom it was taken.

Mr. Att. Gen. Truly my Lord I think I need say no more to this Objection, then that it does not come at a proper time; for with submission, if the Prisoner will upon this Act say he has not had a Copy of his Indictment to enable him to plead, he ought to have taken the advantage of it before he does plead, that is the proper time for him to object this matter to the Court, for if after he has had such a Copy as this Prisoner has had he does submit to plead. With submission it is to late to come at his Tryal and make this objection, he cannot be received to make it after.

L. C. J. Holt. That is a full answer Mr Attorney.

Mr. Att. Gen. I think it is my Lord with submission, not that we would wave giving other answers to it, if it were in a proper time; but the method of proceeding must be, and we think we have no occasion at this time to say any thing more to this objection.

L. C. J. Holt. No, no, that is a full answer in this point, for look ye, you that are of Council for the Prisoner, when once you have pleaded, you admit you have had a Copy, for the Copy was given you to enable you to plead, and when you have pleaded you have past by all advantage that you could have from the Copy, as to any Plea that you can make, for its taken for granted ye had a Copy to enable you to plead; and to advise with your Counsel about it, since you did plead, and do not insist upon it at the time of your Arraignment that you had not such Copy.

Sir B. Shower. My Lord, we have proposed one doubt, and we Humbly Submit it to the Court.

Mr. Sol. Gen. It was their own fault that this objection was not made in time.

L. C. J. Holt. That doubt of yours may serve at another time, but now certainly it is quite out of time.

Mr. Sol. Gen. Nay my Lord, even upon the Arraignment that would not serve their turn neither.

L. C. J. Holt, We will not enter upon that now, pray go on to swear the Jury.

Cl. of Arr. You the Prisoner look to your Challenges, as I told you before. Cryer call Sir *Jeremy Sambrook*.

Cryer. *Vouz, auoz.*

Sir B. Shower. Mr. *Rookwood*, you are to make your own Challenges.

Rookwood. I do not challenge him.

Cl. of Arr. Then held Sir *Jeremy the Book*.

Sir Jer. Sambrook. My Lord, I am incapable of serving upon this Jury, for I have been Deaf this several years. This Dozen years, I cannot hear what is said in Court, tho I am now so near the Court, I

could not hear what your Lordship said ; nor what was said at the Barr. I have a Cetificate here if your Lordship please to have it read ; and most of the Persons of Quality here about the Court Know it to be true.

Mr. Att. Gen. My Lord, I am afraid it is so.

L. C. J. Holt. Nay if it be so, it is not fitting that he shou'd be upon the Jury, when he can't hear what's said, you must excuse Sir *Jeremy Sambrook*. Go on to the next.

Cl. of Arr. George Ford.

Cryer. Couz avoz.

Cl. of Arr. Look upon the Prisoner.

Rookwood. I challenge him.

L. C. J. Holt. Mr. *Ford*, you must not go away for you are upon another Pannell, wherein you may be imployed tho you are now challenged.

Cl. of Arr. William Underhill.

Rookwood. I challenge him.

Cl. of Arr. William Withers.

Rookwood. I challenge him.

Cl. of Arr. Samuell Powell.

Rookwood. I do not except against him.

Cl. of Arr. Then Swear Mr. *Powell*.

Cryer. Look upon the Prisoner, you shall well and truly try and true Deliverance make between our Sovereign Lord the King, and the Prisoner at the Barr, whom you shall have in charge, and a true Verdict give according to your Evidence : so help you God.

Cl. of Arr. Thomas Trench.

Rookwood. I challenge him.

Cl. of Arr. John Wolfe.

Rookwood. I challenge him.

Cl. of Arr. James Bodington.

Rookwood. I challenge him.

Cl. of Arr. John Raymond.

Rookwood. I challenge him.

Cl. of Arr. Richard Marsh, he did not appear, *George Hawes.*

Rookwood. I challenge him.

Cl. of Arr. Francis Barry.

Rookwood. I challenge him.

Cl. of Arr. Arthur Baily.

Rookwood. I except not against him. (He was sworn.)

Cl. of Arr. John Webber

Rookwood. I do not except against him. (He was sworn.)

Cl. of Arr. Thomas Glover.

Rookwood. I challenge him.

Cl. of Arr. Dormer Sheppard.

Rookwood. I challenge him.

Cl. of Arr. George Tredway.

Rookwood. I do not except against him. (He was sworn.)

Cl. of Arr. Matthew Bateman.

Rookwood. I challenge him.

Cl. of Arr. *Timothy Thornbury.*

Rookwood. I challenge him.

Cl. of Arr. *James Partherich.*

Rookwood. I challenge him.

Cl. of Arr. *Thomas Freeman.*

Rookwood. I challenge him.

Cl. of Arr. *Joseph Blithit.*

Rookwood. I challenge him.

Cl. of Arr. *Timothy Lennox.*

Rookwood. I have nothing to say against him. (*He was Sworn.*)

Cl. of Arr. *John Harris.*

Rookwood. I do not except against him. (*He was Sworn.*)

Cl. of Arr. *John Billers.*

Rookwood. I challenge him.

Cl. of Arr. *Richard Bourne.*

Rookwood. I challenge him.

Cl. of Arr. *George Carter.*

Rookwood. I do not except against him. (*He was Sworn.*)

Cl. of Arr. *Francis Chapman.*

Rookwood. I challenge him.

Cl. of Arr. *Alexander Forth.*

Rookwood. I challenge him.

Cl. of Arr. *Thomas Playsted.*

Rookwood. I challenge him.

Cl. of Arr. *William Etley.*

Rookwood. I do not except against him. (*He was Sworn.*)

Cl. of Arr. *John Marsh.*

Rookwood. I have nothing to say against him. (*He was Sworn.*)

Cl. of Arr. *Samuel Hooper.* (*He did not answer.*)

L. C. J. *Holt.* Did Mr. *Hooper* appear?

Cl. of Arr. Yes, my Lord, he is mark'd as appearing.

L. C. J. *Holt.* Then you ought to call him again, and set a Fine upon his Head.

Cl. of Arr. *Cryer,* call *Samuel Hooper.*

Cryer. *Samuel Hooper,* come into Court and give your attendance upon pain of Ten Pound, for the Court has Recorded your Appearance.

Cl. of Arr. *John Hall.*

Rookwood. I challenge him.

Cl. of Arr. *Nicholas Roberts.*

Rookwood. I challenge him.

Cl. of Arr. *William Partridge.*

Rookwood. I challenge him.

Sir B. *Shower.* How many has he challenged Mr. *Hardisty.*

Cl. of Arr. I will tell you Sir *Bartholomew*—he has challenged 24.

Sir B. *Shower.* Well then, go on Sir.

Cl. of Arr. *Peter Laveane.*

Rookwood. I challenge him.

Cl. of Arr. *Thomas Moody.*

Rookwood. I challenge him.

Cl. of Arr. *Richard Bealing.*

Rookwood. I challenge him.

Cl. of Arr. *Thomas Evans.*

Rookwood. I challenge him.

Cl. of Arr. *Thomas Rammage.*

Rookwood. I challenge him.

Cl. of Arr. *Edward Townesend.*

Rookwood. I challenge them.

Cl. of Arr. *William Gunston.*

Rookwood. I challenge him.

Cl. of Arr. *Samuel Freebody.*

Rookwood. I do not except against him. (He was Sworn.)

Cl. of Arr. *Philip Wightman.*

Rookwood. I challenge him.

Cl. of Arr. There are now Thirty two challeng'd. *John Wyberd.*

Rookwood. I challenge him.

Cl. of Arr. *William Strowd.*

Rookwood. I challenge him.

Cl. of Arr. *Daniel Byfeild.*

Rookwood. I do not except against him. (He was Sworn.)

Cl. of Arr. *Benjamin Noble.*

Rookwood. I have nothing to say against him. (He was Sworn.)

Cl. of Arr. Cryer count them. *Samuel Powel.*

Cryer. One, &c.

Cl. of Arr. *Benjamin Noble.*

Cryer. Twelve Good Men and True, stand together and hear your Evidence.

The Names of the Twelve Sworn were these,

<i>Samuel Powell</i>	}	<i>George Carter</i>
<i>Arthur Bailey</i>		<i>William Atley</i>
<i>John Webber</i>	}	<i>John Marsh</i>
<i>George Tredway</i>		<i>Samuel Freebody</i>
<i>Timothy Lennoy</i>	}	<i>Daniel Byfeild and</i>
<i>John Harris</i>		<i>Benjamin Noble.</i>

L. C. J. Holt. Look ye, Mr. *Phipps*, your Objection upon the Indictment slipt me, and therefore I would speak to it now ; You said it might be as well a Copy of the Indictment before it be Found, as well as this a Copy of the Pannel before it be Returned. Now that can't be, for an Indictment is not an Indictment till it be found, it is only a Writing prepared for the ease of the Jury, and for Expedition ; it is nothing till it is found, for the Jury make it an Indictment by finding it, they may alter what they please, or refuse it absolutely. And if the Jury, upon examining the Witnesses, would only present a Matter of Fact, with Time and Place, the Court might cause it to be drawn up into Form, without carrying it to the Jury : Again, There needs no *Billa Vera*, for that is only the Jury's owning that which the Court has prepared and drawn up for them ; but a Pannel is a Pannel when it is array'd before it be returned ; and a Copy of the Pannel given before it be returned, is a Copy of the Pannel returned, if it be afterwards returned, as it must.

Sir B. Shower. But, my Lord, that Notion strengthens our Objection that we last made, that makes it necessary that we should have a Copy of the Caption, as well as the other part, to make it a true Copy of the whole Indictment.

L. C. J. Holt. That's another thing, we will talk of that another time ; but I speak of this only as to his Objection which slipt my memory, because I would have nothing remain unanswered.

Mr.

Mr. Phipps. My Lord, when the Bill is found, the Copy that we delivered before is as much a true Copy of the Indictment as our Copy of the Panel is a Copy of the Jury returned.

L. C. J. Holt. A Pannell is a Pannell when it is arrayed but a Bill is not an Indictment till it be found ; one cannot say a man in *dictatus existit* till it be found all that we say of it, before it be found that there was *quedam Billa* preferred to the Grand Jury, and if the Jury bring it in *Ignoramus*, whereby they disown the Presentment, it is cancelled, and there is no Record of it, nor nothing only a *Memorandum* in the Clerks Book perhaps, that such a thing was. Well, go on.

Cl. of Arr. Cryer, make Proclamation.

Cryer. O, yes ; If any one can inform my Lords the King's Justices of Oyer and Terminer, the King's Serjeant, the King's Attorney General before this Inquest be taken of the High Treason whereof *Ambrose Rookwood*, the Prisoner at the Bar stands indicted, let them come forth, and they shall be heard, for now the Prisoner stands at the Bar upon his deliverance, and all others that are bound by recognizance to give Evidence against the Prisoner at the Bar, let them come forth and give their Evidence, or else they forfeit their Recognizance.

Cl. of Arr. *Ambrose Rookwood*, hold up thy hand. [Which he did.] You that are sworn look upon the Prisoner, and hearken to his Cause, he stands indicted by the Name of *Ambrose Rookwood*, of the Parish of St. Paul Covent-Garden in the County of *Middlesex*, Gent. For that he, together with *Christopher Knightley*, not yet taken, *Robert Lowick*, and *Charles Cranburn*, and divers others false Traytors, &c. ——— prout in the Indictment, *mutatis mutandis* ——— and against the form of the Statute in that case made and provided ; upon this Indictment he hath been arraigned, and upon his Arraignment he hath pleaded not guilty ; and for his Tryal he hath put himself upon God and his Country, and in which Country you are, your Charge is to inquire whether he be guilty of the High Treason whereof he stands indicted, or not guilty : If you find him guilty, you are to inquire what Goods or Chattels, Lands or Tenements he had at the time of the High Treason committed, or at any time since : If you find him not guilty, you are to inquire whether he fled for it ; if you find that he fled for it, you are to inquire of his Goods and Chattels as if you had found him guilty : If you find him not guilty, nor that he did fly for it, you are to say so, and no more, and hear your Evidence.

Mr. Mountague. May it please your Lordship, and you Gentlemen of this Jury, this Indictment that has been read to you does charge the Prisoner with High Treason for compassing and imagining the Death of the King, for endeavouring to subvert the Government, and to subject the People of *England* to the Slavery of *Lewis* the *French* King, and for this End the Indictment sets forth, that the Prisoner at the Bar did privately meet with several false Traytors, to consult how they might compass the Death of the King, and commit those other Treasons ; and that the 10th of *February*, at *Covent-Garden* in this County, it was agreed among them, that they should get together 40 Horsemen, whereof the Prisoner at the Bar was to be one, and they were to lye in Ambush, and set upon the King in his Coach upon his return from going abroad ; some were to attack the Coach, others to attack the Guards, and there were to kill the King in the Coach ; and the Indictment does likewise charge the Prisoner with gathering together Horses, and providing Arms for this purpose. To this Indictment, Gentlemen, he hath pleaded not Guilty ; we shall call our witnesses and prove the Fact, and when we have so done, we do not at all doubt but you'll do your Duty.

Sir B. Shower.

Sir *B. Shower*. My Lord, before the Witnesses are called we have a doubt to propose to your Lordship upon this Act of Parliament, and that is, whether we are to take our Exceptions to this Indictment before the Evidence be opened or given?

L. C. J. *Holt*. It should properly be before the Jury is sworn.

Sir *B. Shower*. The Words of the Act, my Lord, is before the Evidence given.

L. C. J. *Holt*. The Act provides, That if you do not take the Advantage of it before the Evidence given, you shall not move that in Arrest of Judgment.

Sir *B. Shower*. It only says before Evidence given, and no Evidence has yet been given.

L. C. J. *Holt*. But you are certainly very irregular in point of Practice; no body ever took Exceptions to an Indictment after the Jury was sworn.

Sir *B. Shower*. If your Lordship pleases to let the Words be read of the Act of Parliament they are these, That no Indictment shall be quash'd unless Exception be taken in the Court where the Tryal shall be, before any Evidence given in Court upon that Indictment; which, we say, strongly implies that the Law-makers thought it might be done at any time before the Evidence was given in open Court, besides that the Law takes notice that after Conviction it should be of no avail, it would have been a very improper Expression before Evidence given in open Court if it had meant before the Jury were sworn and charg'd; for the Word Evidence supposes the Tryal Commenced: If they had intended it otherwise, that is, that it should be before the Jury is sworn, they would have express'd it to be done at the Arraignment; but mentioning it to be done in the Court where the Tryal is to be, before Evidence given, that supposes the Indictment to be at Issue before the Party needs to make his Exceptions. Therefore, my Lord, we hope we are regular in offering our Exceptions now.

L. C. J. *Holt*. Pray what say you to it, Mr. Attorney.

Mr. Att. Gen. Truly, my Lord, I think they are no way regular; for, with submission, I take it, that though this Act of Parliament has indulg'd them in several things which were not allowable by Law before, yet as to this part they are not allowed to take Exceptions to the Indictment, otherwise than they could before this Act was pass'd: Nay, so far from that, that if your Lordship looks into the Act, you find they are restrained in this point from an Advantage that they had before; that is, they shall not move any such thing as are there mentioned, after Verdict in Arrest of Judgment; so that this part is restrictive to the Prisoner, and takes away some Advantage that he had before; which was, moving in Arrest of Judgment after Verdict; but it leaves the making Exceptions as to any time before the Verdict, as it was before; which was before Plea pleaded; but not after the Jury sworn: For it cannot be denied that in point of Practice such a thing as this that is now offer'd cou'd not have been done before the Act. I wou'd be glad to know whether they can shew any President of any such thing as they now contend for. They say, the Words of the Act are, Exception must be taken before Evidence given; but that must be taken at such a time as they might by the Course of Law do it before: For when the Jury is sworn, they must give a Verdict, and I do not know how they can be discharg'd without giving a Verdict; therefore unless the Act had given Directions for a particular manner of Proceeding in this matter, which it has not done, your Lordship will not, I presume, do it in any other manner than as it was before the Act made, and if there be no president to be shewn of any such thing

as this, of taking Exception to an Indictment after the Jury Sworn and charg'd with the Prisoner; then there is no Power in this Act of Parliament, given to them to take Exceptions to the Indictment at this time, we take it the Motion is very Irregular upon all Accounts.

Mr. Sol. Gen. My Lord, We first say, that it is not proper for them to make any such Motion as this upon this Act of Parliament, till they tell us what their Exception is, that we may see whether it be within the Words and Meaning of this Act of Parliament. The only thing now that is proper for us to consider, is the Issue Joyned, and the Inquiry whether the Prisoner at the Bar is guilty of the High Treason of which he is Indicted, to which Indictment he has pleaded Not Guilty, that's the thing that is now before your Lordship to be tried, they have room for Exceptions to the Indictment afterwards, for some Exceptions I mean (I do not know what their Exceptions are) but if they be such as may be taken after the Verdict, then I am sure they are Irregular now in their Motion, and they can shew no Precedent when it was done after Plea pleaded and Issue joyn'd, as it is in this Case.

Mr. Conyers. The Advantage that the Act gives the Prisoner, of having a Copy of his Indictment so long before Tryal, is to enable him to plead, or to take Exceptions to Quash it; but I never heard a Motion to Quash an Indictment after a Jury is charg'd to hear the Evidence. Certainly they ought to do it before Plea pleaded, and not now to come to make a Motion to Quash the Indictment, after they have pleaded, and the Jury Sworn: Therefore we submit it, upon the constant Practice in like Cases, to the Judgment of the Court.

Sir B. Shower. In Answer to that which *Mr. Attorney* has said, That it is an Improper Time; I thought truly I had moved it for the Advantage and Ease of the King's Counsel, that they might not proceed upon this Tryal, when perhaps after all their Trouble, the Foundation, which is the Indictment, may Fail. I have a great many Exceptions to the Indictment, they say we should name what our Exceptions are, I will acquaint them with them as fast as I can, if your Lordship please, the Indictment is very Loose and Uncertain.

L. C. J. Holt. Certainly the Motion is Irregular in Point of Practice.

Sir B. Shower. My Lord, We were afraid we should be excluded from taking these Exceptions after the Evidence given.

L. C. J. Holt. So you are by the express words of the Act.

Sir B. Shower. Then certainly we may do it before the Evidence given.

L. C. J. Holt. But the Act does not say, Ye shall do it at any time before the Evidence given, especially in such an Irregular Manner, after Issue Joyn'd, and the Jury Sworn. Suppose *Mr. Attorney* had given some Evidence.

Sir B. Shower. Then, my Lord, I agree we had been without the words, therefore I now move it before the Evidence, because the Act of Parliament has given me a Liberty to do it before the Evidence given; for the Law having given this Liberty to the Prisoner, to make such Exceptions within such a time, your Lordship will not restrain us from making use of that Liberty further than the Law has restrained, but we may make use of our Exceptions before the Evidence given, either to

Induce your Lordship to Quash the Indictment, or the Jury to find us Not Guilty, as we hope your Lordship will direct them to do; for what is more common upon Indictments, after the Jury are Sworn, then if Facts appear upon the Record not to be sufficiently alledged, the Court will direct the Jury to find the Party Not Guilty. We think this Act does give us this Liberty, otherwise I know not to what purpose it was made, the very meaning seems to be, that the Exceptions of the Counsel for the Prisoner might be of Prejudice to the King; and therefore it says, After the King's Evidence given, and the Fact discovered, no such Exception shall be made; therefore we must make it before the Evidence given, otherwise what this Act of Parliament that was design'd in Favour of the Prisoner, will prove a very great Hardship upon him, especially in case of an imperfect Indictment, as we apprehend this is, and he will be in a worse Condition than ever he was; he must take his Exceptions now or not at all: The Act says, He is not to take it after Evidence given: And by Construction the King's Counsel would have it, That he should not give it before: And consequently he has no time at all to give it.

L. C. J. Holt. Have not you had time to do it before now *Sir Bartholomew Shower*, certainly you had? You had time this day Sevenight when you were Arraign'd; you have had your Opportunity if you would have taken it; the Jury are now charg'd, the Indictment is opened, they have been told what they are to inquire of, and now you would break in and take Exceptions to the Indictment.

Sir B. Shower. My Lord, This is a new Act of Parliament, it says we shall take our Exceptions before the Evidence given; which we take, it is any time before Evidence given; and if your Lordship will not allow us to do it now, it may be we may lose the Benefit of it absolutely.

L. C. J. Holt. It is one Question whether we shall allow it or no, and another Question whether you can claim it or no: Certainly it is an Irregular Motion, and the like of it was never offered in any Case before, be it Criminal or Civil: For if it be a Criminal Case that is not Felony of Treason, when the Issue comes to Tryal upon an Indictment, Did you ever know an Exception taken to the Indictment after the Jury were charged? Certainly it is contrary to all Practise; and it is not Fair, the Court is not well dealt with, you have had an Opportunity before, and will you now put the Court and the Jury to so great deal of Trouble, to stay till the Jury be called over, the Prisoner called to his Challenges; he has challenged Thirty four, the Jury is Sworn, the Indictment is read to them, the Charge given them, the Counsel have opened the Indictment, and now when the business is only to try the Issue with which the Jury are charg'd, you come to turn us quite round, by taking Exceptions to the Indictment.

Mr. Phipps. My Lord, We take it the Act gives us this time to do it in.

L. C. J. Holt. You know you had another time more proper to do it in.

Mr. Phipps. My Lord, If we have not time now, then this Clause, with humble Submission, signifies nothing at all.

L. C. J.

L. C. J. Holt. The Clause was made in this Respect, to your Disadvantage, because you should have a Copy of the Indictment, whereby you might have an Opportunity to advise with Counsel, that they might Instruct you how to Plead, and to take any manner of Exception before Plea pleaded, it ought to be before the Tryal, and now because of this Advantage, it provides that you shall take your Exceptions before the Tryal, and not move them in Arrest of Judgment; that is the meaning of the Act.

Mr. Phipps. Then, my Lord, there needed no time at all to be mentioned in the Act, but have left it as it was at Common-Law.

L. C. J. Holt. Yes, Yes, there did need a Time to be limited, for this Clause was made I say in your Disadvantage, in depriving the Prisoner of the Benefit of such kind of Exception in Arrest of Judgment, because of the Advantage that was given in the former part of the Act, where you had time given you to make your Exceptions, for which end you are to have a Copy of the Indictment five days before you are called to plead.

Sir B. Shower. We could not come before, my Lord, as we apprehend, because the words of the Act are before Evidence given.

L. C. J. Holt. But I tell you, this Clause was not for your Benefit, but for your Disadvantage.

Sir B. Shower. My Lord, What we press, arises from the very words of the Act of Parliament, if the meaning of the Law-makers was as the King's Counsel now Contend to have it; they would never have used those words before Evidence given in open Court, but have said they should have had no Advantage of the Exception, unless it were before Plea pleaded; it does not say it shall be after the Verdict, or before the Verdict, but before the Evidence given: Now if they had meant what these Gentlemen say, they would have appointed it to be before the Verdict, which would have included the Tryal; because then it had been like the Penning of other Acts of Parliament, the Statutes of *Feotails* and the like, which say, That after a Verdict, such and such Exceptions shall not Arrest a Judgment: But if they can shew me any Statute that is penn'd like this, they give me an answer: All those Statutes are, That no Judgment shall be Arrested or Delay'd upon such or such Exceptions after a Verdict: But here it says, They shall not Arrest Judgment, unless the Exception be taken before Evidence given in open Court. My Lord, We submit it to you, we think the Law-makers did intend somewhat by that particular way of Expression, Different from all other Acts of Parliament; and truly if it be not as we offer to your Lordship, we think it can have no meaning at all.

Mr. Att. Gen. Truly, my Lord, we think it is very plain what the Parliament meant by this Clause in this Act, the Design was, to Restrain the Prisoner from moving in Arrest of Judgment, for Misappelling, or false Latin, or little Matters of Form, if he did not move it in a proper time, having such a Liberty allow'd him, as to have

a Copy of the Indictment so many days before he was compelled to plead : They insist upon it, that the words are, Before Evidence given ; It is so : But what can be the meaning of that ? It must be at such time as the Law allows ; it is not making a new Method of Tryal ; you shall take Exception before the Evidence, that is, before the Tryal, for it can never be intended, that they meant to alter the Course, and let the Council break in between the time of the Jury's being Sworn, and the Evidence given, that by no Law could ever have been done before.

Sir *B. Shower*. Pray, *Mr. Attorney*, when would you have us do it ?

Mr. Att. Gen. Regularly before Plea pleaded, at least-wise before the Jury be Sworn.

L. C. J. Holt. Undoubtedly this is not Regular, it is contrary to all the Course of Practice, it is not fair Dealing with the Court. But then there is another Consideration in the Case, that I would have you think upon : If so be this had been at a Tryal by *Nisi Prius*, then the Judge of *Nisi Prius* is only to try the Issue ; but now here the very Record is before us, and we are Judges of the Record, as well as we are to assist the Jury in Trying the Issue. Now take it in any other Case of the like nature, Suppose a Tryal at the Bar in any Civil Cause, though this be contrary to Practice, and the Court not fairly dealt with, yet when we have the Record before us, and find an Error in the Record, cannot we Quash the Indictment and Discharge the Jury. That is the Question, *Mr. Attorney*, though I must confess, I do not know that it has been practicable.

Mr. Att. Gen. No, my Lord, in a Case of Treason, where the Jury are once charg'd, they are to give a Verdict, they must either Acquit or Convict.

Sir *B. Shower*. It was done in *Whitebread's Case*.

Mr. Att. Gen. But I know what has been usually thought in that Case, and I believe they cannot shew me another.

L. C. J. Holt. Nay, that this is a very Irregular Motion, is very plain.

Mr. Sol. Gen. Certainly, my Lord, you must take it as the Law was before this Act, for this Clause does nothing for the Prisoner, but is against him.

L. C. J. Holt. I know it is not for the Advantage of the Prisoner, therefore I put it as a Case in an Action, or an Indictment, as the Law was before, whether this being a Tryal in the same Court where the Indictment was found, and we find an Insufficiency in the Record before us, whether we cannot Quash the Indictment.

Mr. Sol. Gen. Your Lordship mentions Civil Actions, with Submission, nothing of that kind could be done after once the Cause came to Tryal, but in Criminal Causes according to the Course of Practice, which will always be the Law till particularly altered. I believe nobody can pretend, that after Issue joyn'd, and a Jury charg'd, any one can move to Quash the Indictment. I think I have heard it often said in this Court, that in Capital Cases, as High Treason, you may put in a Plea in

abatement of, but not a Motion to quash an Indictment; I am sure it was disallowed where I moved to quash an Indictment of Murder, let them but show any president of this nature.

Sir B. Shower. We will show you, tho' this is the first Case upon this Act of Parliament, therefore to show any practice upon it would be very hard to require of us.

L. C. J. Holt. But can you show it before this Clause in this Act of Parliament, which, as I told you, is not for your advantage, it does not give you that liberty that you desire.

Sir B. Shower. All the Clauses in this Act of Parliament shew'd their intention was this, that the sense of the Law-makers was, that we should have this Liberty at any time before Evidence given, for if there be such words as shew'd they thought it might quash'd at any time, tho' they were mistaken in the practice, yet we shall have the Liberty that they intended us, and the wording of this Act shows, that the Parliament thought it might be done after the Tryal begun before Evidence given, because they restrain us from taking those Exceptions after the Evidence given, and it is no prejudice to the King at all really, it is rather for the advantage of the Prosecution, because there is none of the Evidence disclosed, and therefore if the Indictment should be found faulty, still the Evidence remains undiscovered upon another Indictment; and I have often heard it said at this Bar in Cases of Indictments for Felony or Treason, as Murder, or the like; if any one did come as *amicus curiæ*, and acquainted the Court, that they were going to proceed upon an erroneous Record, or give an erroneous Judgment, or do any other erroneous Act, he ought to be received with kindness, because he would prevent a wrong doing.

L. C. J. Holt. That is in the proper time not to interrupt the Tryal when the Jury is once sworn.

Sir B. Shower. We are ready to offer our Exceptions, and we hope it is no prejudice at all to the King before the Evidence of the Fact is given.

Mr. Phipps. My Lord, I perceive that this Clause, as they would have it, is intended to prevent us from moving that in Arrest of Judgment, which we could have moved before, and ties us up to do it before Evidence given; now I would fain know, if we could not before this Act move in Arrest of Judgment, for mis-spelling, or false Latin, or improper Latin.

Mr. Att. Gen. You might, no doubt of it.

Mr. Phipps. They say we might, why then, if we could have a time to move it after the Verdict, and that time is abridg'd by the Act of Parliament, which directs that it shall be before Evidence given in open Court, sure we may take any time before the Evidence given, and shall not be restrain'd further than the Letter of the Law has restrain'd us, for this Act was intended for the benefit of the Subject, and ought to be construed as much in their favour as the Letter of it will permit.

Mr. Att. Gen. No doubt of it, it is to be done before evidence given; but the question is, at what time it must be before the Evidence given, whether it must not be at such time as by the course of practice and usage of the Law it should have been done before; if you will satisfy my Lord and the Court that ever such an Exception was taken, or an Indictment

quash'd between the swearing of the Jury and the giving the Evidence, ye say something, but I believe not one instance of that Nature can be given, and therefore it is very irregular for them to do it.

L. C. J. Holt. They don't pretend to it, for ought I hear, for I would put them upon it, to show me whether they could do it before.

Sir B. Shower. I don't question, my Lord, but it might be, with submission.

Mr. Conyers. Did you ever know it before that any one undertook to inform the Court as *amicus curiæ*, but it was to prevent a wrong Judgment, and for that you have your proper time either before Plea pleaded by motion to quash the Indictment, or after Verdict to arrest a Judgment; this Act of Parliament has restrain'd you in particular instances that are mention'd from doing it after Verdict in Arrest of Judgment, but having given you a Copy of the Indictment before you plead, you have had a proper time to make these Exceptions, and if you have laps'd your time you come too late to do it now, for sure nobody ever made a Motion to quash an Indictment after Issue joyn'd and the Jury sworn.

Mr. Soll. Gen. My Lord, I would only mention one Case, and that was of *Sir Richard Mansell*, upon an Indictment of Murder for killing the Apothecary in *Holbourn*; I did my self move to quash the Indictment, because it was not exprest in what year of the King the Fact was done; but the Court was of opinion we cou'd not move to quash an Indictment for that or any such notorious crime, till after the Fact determined.

L. C. J. Holt. No, we were always of that opinion, never to allow Motions to quash Indictments for Perjury, Murder or any great offence, but it must be moved in Arrest of Judgment afterwards.

Mr. Cowper. My Lord, these Gentlemen seem to beg the question upon this Act of Parliament, as if it had appointed this to be the time of making Exceptions to the Indictment, the Act of Parliament does not say you shall make your Exception immediately before the Evidence given in open Court, as if it had pointed out and directed to them that particular time, that then they should take their Exception and no other time: the Act has only set a bound, that they shall not do it afterwards, but as to the particular time, it is left as it was before, to the regular Course and Method of Proceedings, which is before Plea pleaded.

Mr. Phipps. My Lord, they do not answer my Objection, it is, it seems, a Restriction of a Liberty that we had before of moving in Arrest of Judgment; if so, we ought not to be restrained further than we are by the words of the Act of Parliament, which say, before Evidence given, that is at any time before Evidence given, as well after as before Plea pleaded.

Sir B. Shower. I would ask these Gentlemen, whether the Law intended that we should have no advantage of excepting against false spelling and improper Latin.

Mr. Conyers. Yes, they did, but that you should do in your proper time.

Sir B. Shower. Then the time for doing it must be that which the words of the Law say, before the Evidence given in open Court, and that's now.

Mr. Conyers.

Mr. Conyers. No, you might have come at the Day of Arraignment, and have taken the advantage of it then before you had pleaded.

L. C. J. Holt. Ye have had my opinion what I think of it, my Lords and Brothers, I suppose will tell you theirs.

L. C. J. Treby. My Lord Chief Justice has delivered his opinion in this matter, and he thinks fit that we should deliver ours. I think this motion of the Prisoner's Council to quash this Indictment after the Jury sworn, is irregular and quite out of season; the intent of this Clause in this Act of Parliament, certainly was not in favour of the Prisoner, it abridgeth him of a Liberty he had before, but gives him nothing: for the Law-makers did think they had given the Prisoner an extraordinary Favour in the foregoing part of the Act, in giving him a Copy of the Indictment five Days before he should plead, and a Copy of the Pannel two Days before he should be tryed, and allowing him Council, and all these advantages were to enable him to quash the Indictment, or the Process returned, for the Clause extends to both: the words are, *That no Indictment nor Process or Return thereupon, shall be quash'd on the Motion of the Prisoner or his Council for mis-writing, mis-spelling, false or improper Latin, unless Exception concerning the same be taken and made in the respective Court where such Tryal shall be by the Prisoner or his Council assign'd before any Evidence given in open Court upon such Indictment, nor shall any such mis-writing, &c. after Conviction be any Cause to stay Judgment:* therefore they made this extraordinary Provision to restrain the Prisoner, in part, by this Clause; as much as to say you have an advantage of the Copy of the Indictment, and you may make use of that to quash it by Motion, if you think fit, as you may also the Process, but it shall be *before Evidence given.* 'Tis true, those are the words, but the using that term, *viz. quashing* such Indictment or Process, shows it must be done in such a way and time as is proper for quashing: and the very words are, that it shall be *upon Motion.* Now we are to expound those words. And I say, a *Motion to quash* an Indictment, must be understood a Motion in the proper Season, which I think is before Plea pleaded; but at least before the Jury is sworn. There were three times when the Prisoner might have had the advantage of a fault in the Indictment before this Act: 1. By Motion to quash it before Plea pleaded. 2. Then afterwards in Arrest of Judgment: and 3. After that by Writ of Error. Now this Clause of this Act takes away the Privilege of moving in Arrest of Judgment for mis-writing, &c. but saves the advantage upon a Writ of Error, and upon a Motion to quash the Indictment. We are to consider what is a proper time for a Motion to quash an Indictment, the Motion is to be made to the Court, and to them alone. It is not to be made to the Court and the Jury. When the Jury is sworn, all Application is to be made to the Court, as having a Jury present which they are to assist in the Tryal and Determination of the *Fact* only. What use then is there of the Jury, when you make this Motion, which consists only in points of *Law*? They must stand by and be out of Office all the while this Motion is making: and it is not reasonable, nor certainly ever was intended that after a Jury is sworn to try a matter of *Fact*, they should stand idle, while you

move a thing which you should have moved before they came to the Bar, suppose you should now move some Exception to the *Venire*, and the Return thereupon, should we, when we and you also have admitted the Jury to be sworn, quash the Process whereby they are Return'd? And yet we may as well do that as this. For, the Act provides in the very same words concerning Quashing *Process* and *Indictments*. But, when the Jury is sworn, and ready to receive their Evidence, sure, then it is out o' all season to make such a Motion, therefore I do not think the Parliament intended by this Clause (which was a kind of Exception to the Favour the Prisoner receiv'd by having the Copy of the Indictment) to institute a new Method of Proceedings for Motions to Quash Indictments, even when a Jury is at the Bar and sworn to try the Issue, and there is nothing proper to be proceeded upon but only to hear the Evidence produc'd for the proof of that Issue, till the Jury is discharged. But still this I would say; this is a new Case and upon a new Statute. I am truly of Opinion, that the Motion is altogether Unseasonable and Irregular, and it should have been made before, and you had a full Opportunity to make it this Day Seven-night before Plea pleaded, and you might likewise to Day before the Jury was sworn; therefore when the Jury are now at the Bar actually enter'd into, and imploy'd upon the Service, the Court ought not to be Interrupted by such a Motion. Yet nevertheless I would propound this, that, seeing it is a new Case and upon a new Statute, the Court would forgive the Irregularity (for I think it does need Forgiveness) and if the King's Council will Consent to it (to prevent any Error or any pretence of Hardship upon a new Law) that we should hear their Exceptions.

L. C. Baron. This Act of Parliament, as it has given a Benefit to the Prisoner that he had not before, in allowing him a Copy of his Indictment in order to his taking Exceptions to it; so it has Restrained him as to the time of making those Exceptions: That he should have a time for it, there is no Doubt; and the time limited for it, as this Act says, must be before Evidence given, because it might well be thought unreasonable that there should be any Quashing of the Indictment at the Prisoner's or his Counsels motion after such time as the King had given any Evidence whatsoever in the Case, for that would be a Discovery of the King's Evidence, and great Inconveniencies might ensue thereupon; but the Question is at what time this is to be done; Whether it may be at any time before Evidence given, or no; it was intended surely that the Motion to Quash the Indictment and taking Exceptions to it should have their proper time as well as effect, and that must be before the Tryal; but it was not the Intent of the Act to alter the Method of Proceedings formerly used in Criminal Cases, for after the Jury is Sworn it is their proper Office to determine the Fact; now if before this Act of Parliament (as it hath been said) it never was allow'd to take any such Exception as this after the Jury sworn, but that the Regular time for such Motions, is, before Plea pleaded or Jury sworn, that is, before Evidence given, as the Act of Parliament directs; for it is not said, as Mr. *Cowper* observ'd, that it should be

be immediately before the Evidence be given. I do not suppose this Act alters any thing as to the Method of Proceedings from what it was before, but that this Exception now comes improperly after the Jury sworn, when it ought to be taken before Plea pleaded, at least before the Jury sworn. It is a new Act of Parliament, and this is within the words of the Act that it is before Evidence given, as the Counsel for the Prisoner say the Act directs. I take it you have lost the Regular time for making this sort of Exceptions, and you would invert the whole Method of Proceedings upon such Tryals as these; for to what purpose is it to take Exceptions to quash the Indictment when the Jury are once charged with it? If it be an Indictment that ought to be quash'd the Jury ought not to be charged, you have had two times, and they are both of them claps'd for this matter, that is, at the Arraignment and before the Jury sworn; yet I would propose it to the King's Council as my Lord Chief Justice of the Common Pleas has done, it being a new Case, that it should at this time be consented to, that the Exceptions, as the Mis-writing, Mis-spelling, false or improper Latin might be made, but that for the future it may be taken notice of that such Exceptions are to be taken before the Jury be sworn.

Mr. J. Nevile. I would begin with the Proposal, because, I believe, I may not be so clear in my Opinion, otherwise I must deliver my Thoughts according to my Judgment, but I would have the King's Council consider of the Proposal.

Mr. Att. Gen. My Lord, for us to consent to that in such a Case as this, where the Court thinks it not Regular, would be pretty hard to desire of us if any thing of advantage should happen on the other side, I verily think the Council for the Prisoner will not be so ready to consent to wave any such advantage, nor am I for asking them to do it; this Clause goes only to some faults in the Indictment; Mis-spelling, Mis-writing, false and improper Latin, that is all that they are Restrain'd from moving in arrest of Judgment, any thing else, any Uncertainty or other matter that is not comprehended under these Particulars they may take advantage of to move in stay of Judgment after a Verdict this Clause does only abridge them from moving in Arrest of Judgment for Mis-writing, Mis-spelling, false or improper Latin, therefore if your Lordship should think it reasonable we should consent to let them in to make any Exception now, it must be confin'd to those particular Objections of false and improper Latin, there can be no colour to make the Liberty larger, because for any thing else they are not restrain'd from moving it in Arrest of Judgment, for there can be no hardship in that Case as I think they have no reason to complain that there has been in any other part of the Case, but for those Particulars that there may be no Complaint of Hardship, if your Lordship thinks it reasonable we should consent it may be we may be prevail'd upon to do it, though whatever Hardship does happen it is their own fault, and the Prisoner may thank
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his own Counsel for that Hardship: If we assist them now to let them in it ought to be taken as a great Kindness, and truly, my Lord, I am unwilling to do any thing that your Lordship and the Court should think hard upon the Prisoner. Certainly it is the fault of their own Counsel now the Law has allow'd the Prisoner Counsel not to take the proper time and pursue the usual Methods; and it is a strain beyond what is usual, that we must help their Faults by our Consent; however if the Court think it Reasonable I shall not be against it, but then I am sure the Court will take care they shall be confin'd to those Particulars that are mentioned in the Act.

L. C. J. Holt. No doubt of it: Therefore *Sir Bartholomew Shower*, are your Exceptions for Mis-spelling, Mis-writing, or false or improper Latin; for if they be such things as you may move in Arrest of Judgment, and have that advantage then there is no colour that we should break through all the Rules of Proceedings to admit such an irregular Motion as this.

Sir B. Shower. My Lord, in the Case of a Life of a Man I will not take upon me to say what is Mis-spelling, Mis-writing, or false or improper Latin, or what is Substantial, but all that I say is, I have Five Exceptions, every one of them imports a Doubt, as I take it, worthy the Consideration of the Court, and some of them effectual enough to Quash the Indictment; but for me, when a Man's Life is at stake, and it partly depends upon me as his Counsel, to say what is proper or improper Latin, or to admit it to be matter of Substance, and then to morrow to have it come and told me, you should have mov'd this to Day, then I am sure they would have reason to say, it was the fault of the Prisoner's Counsel, for he would have chosen very ill Counsel, in me, I confess, if I should consent to put any such disadvantage upon him. I beg the Favour that I may have the Liberty to propose my Objections, which I think are worth Considering of; it is for the advantage of the King for us to take our Exceptions all together, because, else if any of them prove material the trouble of the Tryal will be but mispence of time.

L. C. J. Holt. No, we cannot hear all your Objections, but those that are mention'd particularly in the Act of Parliament, for such as are not mentioned in the Clause you have a proper time to move them in Arrest of Judgment.

Sir B. Shower. Then we will put those that are within the Act.

Mr. Att. Gen. If we do any thing by way of Consent in this Matter, we must insist upon it, that they be confin'd to the Particulars in the Act, we desire they may open their Objections to the Court, and if the Court shall think they are properly under those Heads then they will consider of them, if the Court be of another mind then they must be reserv'd till the proper time.

L. C. J. Holt. Do you Consent then, Mr. Attorney, that they shall now take those Exceptions that are mentioned in the Act of Parliament.

Mr. Att. Gen.

Mr. Att. Gen. If the Court think it reasonable upon those terms, I do.

Mr. B. Powys. Let them open them if your Lordship please, and let us keep the Power in our own Hands to do as our Discretions shall direct.

L. C. J. Holt. Truly I do not know whether we can do any thing in this Matter, I question much whether it be Discretionary in us to break through all the common method of Proceeding and admit of such Irregularities.

L. C. J. Treby. I have a great Inclination to hear them, that we may get rid of these pretended Exceptions, which I am apt to think will, when opened, disappoint the Expectations that may be raised by this mentioning them in general; for, I have that Opinion of the Ability and Circumspection of the Counsel that I believe if they had had Exceptions sufficient to quash the Indictment, we should have heard of them at a time more proper than this now between the Swearing the Jury and giving Evidence to them. But, possibly, the Counsel may think fit to make an Essay, and try what can be got out of this unusual Expression in this new Act.

L. C. J. Holt. No, no, I know this is a piece of Art, and the Court is not well dealt with in it.

L. C. J. Treby. Indeed I am very willing to hear them for that Reason.

L. C. J. Holt. I look upon it only as meer Trick and a piece of Art to tast the Opinion of the Court.

Sir B. Shower. My Lord, it was my mistake then, for I take it, if the Act of Parliament had intended otherwise they would have exprest it otherwise.

L. C. J. Holt. Does the Act of Parliament give you another Liberty and a greater than you had before? does it not design to abridge you of a Liberty that you had before? Certainly it never intended that the Court should admit of any Irregular Proceedings.

Mr. J. Powell. You should have tim'd your Motion better, for certainly now the Jury is charg'd they must give a Verdict either of Acquittal or Conviction; and if you move to quash the Indictment and your Exceptions are material, the Jury cannot proceed; you see what a pass your Motion has brought it to, 'tis certainly a mighty Irregular Motion.

L. C. J. Treby. What Judgment would you have us give? I would ask you that: If any Exception were moved before the Jury were sworn, and it proved material, the proper Judgment were, that the Indictment be quash'd; but now they are sworn, what Judgment must we give? must we not expect the Verdict of the Jury first upon the Fact? and must we then give Judgment upon your Exception?

Sir B. Shower. I know not whether your Lordship may not give Judgment first to quash the Indictment and then discharge the Jury.

L. C. J. Treby. And what if we do not find cause to quash it, then you'll say, we must go on with the Evidence, as we were going before
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this interfering? Are we to be doing two things at once. I am pretty certain you can show me no president for any like proceedings in any Case: it is confounding the offices of the Judge and Jury.

Mr. Phipps. If your Lordships try'd the validity of our Exceptions, and find occasion to quash the Indictment, there will be no need of a Jury.

L. C. J. Holt. Upon the Statute of *Jeofailes* in a civil cause, suppose at a Tryal at Bar, it appears upon the Face of the Declaration, that there is such a mistake as will be cured by the Verdict; but if the party had demurred, and shown it for cause, it would have been fatal. Do you think when he has wav'd the benefit of Demurrer and pleaded to Issue, that you shall move this and help your self by such a Motion, because it will be helpt after a Verdict?

Sir B. Shower. If this Act had been worded as that Statute of *Jeofailes* is, it may be we might not.

L. C. J. Holt. Why, it is not said in the Statute of *Jeofailes*, that it shall be good after Issue joined, before the Jury is charg'd or sworn, but that it shan't be good after the Verdict.

Sir B. Shower. It is before the Evidence given.

L. C. J. Holt. Could he do so in any Case before this Act, and does the Act enlarge your Liberty or abridge it?

L. C. J. Treby. *Sir Bartholomew Shower*, you insist upon part of the words of the Act of Parliament, it says, no Indictment or Process shall be quasht upon the Motion of the Prisoner or his Counsel, unless it be made before any Evidence, &c. Now, I suppose, the Parliament use that Expression, *upon the Motion*, in the same sence as it is used in Law, *viz.* for such a one as should be in the time when Motions for quashing the Indictments are properly to be made; now, when is that? it is plain, it was always before the Jury come to the Bar, nay before the Plea of the Party. If that be the proper time to make such a Motion, then that Expression in this Act of a *Motion to quash the Indictment* will very well help to construe the other part of the Clause that you insist upon: for if the Motion be made before Plea pleaded, it is certainly before the *Evidence given* in your sence. And I conceive, that under that Expression [*Evidence given*] which signifies the *main* part, the Parliament intended to comprehend the whole proceeding to Tryal, Beginning, if not from the pleading *Not Guilty*, at least, from the *swearing* the Jury. *Before Evidence given in Court*, may reasonably be expounded, *Before the Prisoner hath fully entred into that Contestation of the Fact, which is to be determined only by Evidence in Court.* I attended the Court of *King's-Bench* a long time, and I believe that I have heard it said a hundred times, upon Motions to quash Indictments of great or odious Offences; no, try it, says the Court, we will not quash it, plead to it, let the Fact be tryed, you may then move it in Arrest of Judgment. Those Expressions shew'd that the proper time for a Motion to quash an Indictment was before Plea, tho they in their Discretion would not grant a Motion to quash, in Cases of such great Offences. But sure they did not think that when a Jury came to the Bar, it was a tolerable time to move to quash
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an Indictment, there was no expectation of hearing of such a Motion then. And certainly this clause which is made wholly against the Prisoner, should not be construed to help him to such a new extraordinary and absurd Liberty.

Sir B. Shower, My Lord, with submission, that practice goes upon another reason, the Court would not Quash it at all upon a Motion; this Act of Parliament supposes that you will Quash upon a Motion at any time before Evidence given; We never heard of a Motion to Quash an Indictment for Felony or Treason, but still the Court would always say, Demur, or Plead, or move in Arrest of Judgment, but by this Law it seems the Sence of the Parliament was, that it might be Quasht upon a Motion.

Mr. Sol. Gen. *Sir B. Shower* is come to what I said, that in truth there is no such thing as Quashing an Indictment for Treason or Felony, as I mention'd. *Sir Rich. Mansel's Case*, and I think the Rule that was given in that Case will serve now in this Case; I am for consenting if they be kept within the Limits of the Act of Parliament, but I must Desire the Opinion of the Court before we do Consent.

L. C. J. H. Aye, aye, go on brother *Nevile*.

Mr. J. Nevile, I must confess I cannot but doubt, as this Act is, there were two times that they had liberty of taking these Exceptions to Indictments; but indeed, in Murder and Treason they were seldom admitted, till they came to move in Arrest of Judgment; but still there was always a privilege, and a time given to the Prisoner, be the Crime what it would, to take that advantage which the Law gave him, to prevent Judgment against him. Now I agree, it is irregular and unreasonable to offer it now, and quite different from all former practice; you might have done it before, now the Act says expressly it must be done before Evidence; but you might have taken advantage before the Jury was sworn, nay before you had pleaded, but you have lapsed your time. Yet truly, notwithstanding you have lapsed your time, I cannot satisfy my self to take away the liberty that the Law has given the Prisoner sometime or other, to except against the Indictment. It is plain, that before this Act, after Verdict he might have moved in Arrest of Judgment, now he cannot do so; whether the fault be in the Council I cannot tell, but the great prejudice is to the Person that is to be Try'd, who will now be wholly precluded from making any advantage of the Exceptions he has to the Indictment, because by the Act he cannot move in Arrest of Judgment. This seems a strong Implication that the Parliament intended he must have some time or other, but before Evidence given, to offer his Exceptions. I say this only to those particular things that are mentioned in the Act, Miswriting, Misspelling, False or Improper Latin; as to these four particular things which the Party is barr'd from moving in Arrest of Judgment, I cannot satisfy my self but that he should have one time or another to take this advantage before the Evidence given, and therefore I think he should have it now: It is true, it is altogether

ther irregular, the Jury being sworn, and it ought to have been done before; but I hope, if it be admitted now, it will be with such observation, that no body will ever offer at it for time to come. As this Case is before us, and the Act of Parliament, which perhaps may have led the Council into that mistake, that it might be any time before Evidence given, tho' they knew the proper time, and the regular method in other Cases, yet I doubt it is hard to put such a Construction upon this Act on the sudden quite to debar the Prisoner of the benefit of his Exceptions to the Indictment.

Mr. J. Powell. I have already declar'd my Opinion, that the Prisoner has had his proper time for making his Exceptions, but he has elapsed that time; but I am not against that Motion in a Case of Life, upon an Indictment for so great a Crime as Treason is, and where the Consequence is so great, if it may consist with the Rules of Law, and it be the Sence of the Court, and the King's Council consent to let them be heard, I submit to it, nay I would second or third that Motion that they may be heard.

Mr. J. Eyres. Truly I am of the same Opinion, I think we ought not to alter the ancient Course of Law by words of Implication, nor go any farther then the Act of Parliament do's express. The Act appoints that a Copy of the Indictment should be delivered to the Prisoner so many days before, to enable him to make his Exceptions, and therefore deprives him of the benefit of those Exceptions after Conviction in Arrest of Judgment. I see no words in the Act of Parliament that do alter the Course of Proceedings, as to this Matter, from what it was in all Civil and Criminal Causes before; Persons must take their advantage of Excepting in their proper time, but when it comes to Issue, the next thing to be done is the Tryal; And truly I must needs say the Council are to blame, that knew this so very well, that if they have any advantage of Excepting, they did not take that advantage sooner, it is their fault; but seeing it is so, I am of Opinion, not to foreclose the Prisoner, as the Case stands. I would be tender of Life, but at the same time I declare my Opinion upon this Act of Parliament as the rest of my Brothers have done, to prevent the Objection for the time to come; yet seeing there is this Misfortune, and there would be a Hardship upon the Prisoner by the default and neglect of his Council in the Case of a Man's Life, I would be so tender as to indulge them to make their Objections now.

Mr. B. Powys. I am the same Opinion the Prisoner has lap't his time, for I take it this Clause of this Act of Parliament has not altered the Common Course of Proceedings, nay, I take it signifies very little in this Case, for certainly it was intended to disable the Prisoner, and not to enable him at all; And therefore, as this Case is, I think it very Irregular and Impracticable to introduce so great a Novelty, as to admit the Motion for quashing the Indictment; When the Jury is Sworn, and when the Fact is the onely single Point to be Determin'd and every thing else ought in Legal Course to come before or after; but for us to Confound time, one time for

for Pleading, another time for Tryal, and another for Arrest of Judgment, all at once, and to have a Jury attending meerly to hear Council at the Bar moot Points of Law, which might be Determin'd either before or after the Tryal, is so very Irregular, that it really Introduces nothing but Confusion, which Courts of Justice ought to avoid above all Things, and ought to keep to the proper Seasons that the Law allows : Therefore, truly I think in strictness of Law we ought not to allow it ; but it being in a Case of Life, and it being a new Case upon a new Act of Parliament, if the King's Council think's fit to Consent, I shall be for it, if not, I think in strictness of Law we cannot allow it.

Mr. *Att. Gen.* My Lord I am very unwilling to deny the Prisoner any advantage, that he might have had by this Act of Parliament, though his Council have slipt the proper time ; if Sir *Bartholomew Shower* will say his Exceptions are to any of the four particular Heads mentioned in this Clause of the Act of Parliament, for we must Confine them to that, then we do Consent that he should make them now.

L. C. J. Holt. Truly Mr. Attorney, if you do Consent that they take their exceptions now, we may consider of it whether it can be ; but I know not how we could admit them to that liberty otherwise, for if there be any thing material, they may move it in Arrest of Judgment.

Mr. *Att. Gen.* And I believe they won't say their Objections are so slight, as to be onely matter of form, they say they are substantial, and then your Lordship will hear them in a proper time.

Sir *B. Shower.* I don't know whether I am mistaken in the Law, I am sure you are mistaken in the Indictment.

L. C. J. Holt. Well, do you Consent to let them make their Objections, as to those four Heads in the Act of Parliament.

Mr. *Att. Gen.* Yes, my Lord, if it be any matter of substance, that is out of the Case at present, for the Provision of the Act of Parliament is onely for meer matter of form, and I should be very unwilling in any Point that is Material, to make a President in such a Case as this.

L. C. J. Holt. I Confess if you had Consented further, I do not know how we should have admitted of it.

L. C. J. Treby. I tell you how I thought it might be done, you might have committed an Irregularity, for which in a Case of Life, and upon a new Law, I believe and hope we should have been forgiven.

L. C. J. Holt. Well, for my part I will not commit any Irregularity upon any Account whatsoever ; I cannot see how by Law they can take any exceptions to the Indictment, Mr. Attorney cannot Consent, and if he did, I think it could not be, unless he did also Consent to discharge the Jury ; but I see they will not offer any Objections according to your Consent, Mr. Attorney, and therefore pray go on to open the Evidence.

Mr. *Att.*

Mr. *Att. Gen* May it please your Lordship, and you Gentlemen of the Jury, The Prisoner at the Bar, *Ambrose Rookwood*, stands Indicted for High Treason, in Compassing and Imagining the Death of his Majesty. Gentlemen, the Overt Acts that are laid in the Indictment to prove this Treason, are, that He, together with divers Others, had frequent Meetings and Consultations, in order to Assassinating His Majesty's Royal Person, and did provide Horses and Arms for that purpose.

Gentlemen, the Evidence that you will hear, to prove these Facts that are thus laid, will be of this nature; you will hear by the Witness, That there has been for some Years a Design carried on to Murder the King's Person; That this was Discours'd of, and several Debates and Consultations were had about it the last Year, some time before the King went to Flanders; there was several Meetings, where were Sir *William Parkins*, Captain *Porter*, and *Chernock* that was Executed, and several others, and there they did Consider in what way to take off the King at that time; and you will here they did expect a Commission to authorise it from the late King *James*; but then the Commission did not come, they had not any such at that time; but they did think fit to put it in Execution without any such Order and Authority, and therefore they endeavoured to have got a Vessel to have Carri'd them off after they had Executed this Bloody Conspiracy, but it hapn'd His Majesty went to *Flanders* sooner then they thought, and they could not provide themselves of a Security for a Retreat, and so at that time the Design was laid aside.

But Gentlemen, you will hear this Conspiracy was Renewed and, Set on foot this Winter, and in Order to the Accomplishment of it you will hear, that about Christmasts last there were several Persons sent from *France* by the late King *James*, on purpose to put this Horrible Design in Execution. Sir *George Berclay* was to be at the Head of it, he was a Lieutenant in one of the late King *James's* Troops of Guards in *France*, he was sent over with a Commission, and Mr. *Rookwood*, the Prisoner at the Bar, was a Brigadier in the Guards there; These came over, and several other Troopers of the late King *James* Guards, by two or three at a time, that they might not be observ'd; particularly you will hear, that when Sir *George Berclay* was come over, several Troopers was sent to by King *James* himself to come to him at *Saint Germain's*, and there he told them he had a piece of Service for them to do in *England*, and that they should observe Sir *George Berclay's* Orders and Directions. More particularly there were one *Harris* and *Hare*, two Troopers in the Guards, was sent for by the late King *James* into the late Queen's Bed-Chamber at *Saint Germain's*, where Collonel *Parker* was present; they were told by the late King He was sensible they had served him faithfully, and He would advance them, and He had now a piece of Service for them to do, which would enable him to do it; He told them, they must go
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over into *England*, and be sure to obey Sir *George Berclay's* directions, and they were ordered to endeavour to find out Sir *George Berclay* when they came into *England*; and were told by him, that they would meet Sir *George Berclay* twice a Week in *Covent-Garden Square*, in the Evening, and the token by which they shou'd know him, was, he would were a White Hankerchief out of his Pocket; this they were told by the late King, when he sent them upon this Errant; Colonel *Parker* was by at the same time, and being there he was ordered to go to Mr. *Carol* Secretary to the late Queen, who had order to furnish them with Mony, to bear the charges of their Journey into *England*, and if they were detained by contrary Winds, they had Letters of Recommendation to Moun-sieur *Latour*, the *French Kings* President at *Callis*, to furnish them with Mony, to bear their charges over into *England*, and accordingly they went; but being detained at *Callis* for want of a Wind, they were furnished by the *French* President; and by the beginning of *February*, they came over.

But I omitted one thing, Gentlemen: Before they came over, the late King when they were with him took a List out of his Pocket of Names, and told these two, *Harris* and *Hare*, what Names they should go by in *England*; *Harris* was to go by the Name of *Jenkins*, and *Hare* by the Name of *Guiny*, and accordingly they came over in a Boat, and landed in *Kent*, and when they came to Town they endeavoured to find out Sir *George Berclay*: The first time I think they did not find him; but the second time they did find him; and he Saluted them, and told them he was glad to see them come over, and he would furnish them with Mony, and he sent Major *Holmes* to them, and accordingly he did come, and give them Subsistence Mony.

Now Gentlemen, you will hear that Sir *George Berclay* being come over with these Troopers and many others, to the number of 16, that at several times were sent upon this Conspiracy, I say, after they were come, Sir *George Berclay* had frequent Meetings and Consultations with several other Persons that were to be engaged in the same Design; and they met at several places, sometimes at Captain *Porters*, sometimes at the *Nags-head* in *Covent-Garden*, at another time at the *Sun Tavern* in the *Strand*; and you will find by the Evidence, that the Prisoner at the Bar, Mr. *Rookwood*, was present at most of those Meetings, and there they did Consult of the best ways and methods for putting this Conspiracy in execution; sometimes they thought of doing it by an Ambush, laid on the other side of the Water, by Persons on foot, in a little Wood there near *Richmond*, where the King was to pass by, whilst others on Horseback were to take notice of their Firing, and then to Attack the Guards. This was proposed, but there was another Proposal to do it on this side the Water; and therefore to settle the matter, one of the Conspirators, *King*, was sent to view the Ground on the other side of the Water, and he did Glory that he had found a very proper place, and thought it a very Convenient method, but yet they were not all satisfied, and at the *Nags-head Tavern* in *Covent-Garden*

they did Debate the matter again, and it was resolved to have the Ground viewed again, and *Porter*, and *Knightly*, and *King* that was executed went to view the Ground on both sides the Water, to see which was the most convenient place; this was about the 12th of *February* they did take an account of the most convenient places on either side, and when they had done it, they came back in the Evening to give an account what they had done, to several others of the Conspirators, who met for that purpose, and I think the Prisoner at the Bar, Mr. *Rookwood* was present there at this Meeting; and you will hear, the place agreed upon was the Lane that leads from *Turnham-Green* to *Brentford*, that they thought the most convenient place, because there were several Inns in and about *Turnham-Green*, and *Brentford*, where they might place their Men by two or three in an Inn, that they might not be lyable to observation: This was the place that was approved of.

Then next, the manner of doing it was to be considered and adjusted, and that was thus: That the whole number should be divided into three Parties, one Party to be commanded by Sir *George Berclay* to attack the Coach, and Kill the King, and all that were in it, while at the same time the two other Parties to be commanded by Captain *Porter*, and Mr. *Rookwood* the Prisoner at the Bar, were to set upon the Guards; and the time agreed upon to put it in Execution was the Fifteenth of *February* on *Saturday*, that being the usual day the King went to *Richmond* a Hunting, and you'll find that on *Saturday* Morning they met in several Parties, not altogether, but under the several Heads of the Parties in order to be ready, if the King had gone out that Morning, to have Assassinated him.

Gentlemen, I say, you will hear of several Meetings that day; there was one Meeting at Mr. *Charnock's*, where were present Mr. *Porter*, Sir *William Parkins*, and several others; and another Meeting you will hear of where the Prisoner at the Bar was present, at the Lodgings of one *Counter*, another of King *James's* Friends, that came over for this purpose, and there was Sir *George Berclay*, and there was the Prisoner at the Bar; and those that were to be under Sir *George's* Command met that *Saturday* Morning in order to make ready, in case the King had gone abroad, to have attackt him: You will find by the Evidence that the Prisoner was there, and *Harris* that was one of the Troopers sent over from *France*, was sent for, and came in and found them in a great Hurry, for *Harris* was not acquainted at *St. Germans* with the immediate Design of Assassinating the King, but finding them in a great Hurry he askt them what was the matter? And they told him they were to make ready immediately upon the Design. He wonder'd at it, and askt what it was, and then they told him they were to go to Attack the Prince of *Orange* to Assassinate him, and *Rookwood* the Prisoner at the Bar told him, if he would go to *Counter* he should have particular Orders and Instructions from him what to do. Accordingly *Harris* went to *Counter*, he told him where his Horse and *Hare's* Horse, and *Hungate's* Horse were; and their Horses hapned to be placed in *Somerset-House*, by Mr. *Lewis*, in a Stable there recommended by him, to the Care of my Lord *Feversham's* Servants, who were to take care of them, and of two or three more that were placed there, in all, six of these Conspirators Horses by the

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Recommendation of Mr. *Lewis* were lodged in that Stable in *Somerset-House*, and lookt after by my Lord *Fewersham's* Men; and thither *Harris*, *Hare*, and *Hungate*, were directed by *Counter* to go for their Horses.

But it hapned by very good Providence, that his Majesty did not go abroad that day; and *Darance*, one of the Orderly Men that Lodged at *Kensington* to give Intelligence, came from thence and acquainted them, that the King did not go out that Morning, so there was nothing more done; but *Harris* was told that he should have his Horse at that time, and take it away, and in the mean time till they were to go upon their Design, they were to Ride out upon their Horses, as they had opportunity to make them fit for Service, or else it would be thought the Riders fault if at the time of the Attack, they did not come up in good time and order to join with the rest, and it would be thought want of Courage in the Rider; and accordingly Major *Holmes*, another of those Conspirators, went with *Harris* and *Hare* to *Somerset-House* to take away their Horses, and they carried them to a Stable in *Soho*; but for several Nights they had been kept at *Somerset-House*.

You will find, Gentlemen, that Mr. *Rookwood* the Prisoner at the Bar was concerned in all these Consultations and Meetings, in making Preparations for the Assassination they intended, as I said, to do it on the Fifteenth of *February*; but that not taking effect at that day, between that and the *Saturday* following, Mr. *Harris* was frequently in the Company of Mr. *Rookwood* and Mr. *Lowick*, and others, where they did discourse of this Assassination, and they did think it a very Barbarous Thing, but however they Resolved they would do it, for they had Orders to Obey Sir *George Berkeley*; and this was expressly declared by *Lowick* and the Prisoner, that they had Directions to Obey Sir *George*, and what he would have them do they would do; they must and would Obey Orders; that was their Resolution even upon discouraging of the Hainousness of so Bloody and Barbarous a Design.

You will likewise hear, Gentlemen, by the Evidence, that the next *Saturday* being the Two and Twentieth of *February*, they Resolved to put it in Execution again, and accordingly there was a Meeting on the *Friday* before at the *Sun-Tavern*, where were present Sir *George Berkeley*, Mr. *Porter*, and others; and there they did Resolve upon it, though they had at first some Apprehension the Thing was Discovered, but they were soon satisfied there was no such thing, because they said among themselves, that if it had been so they should have been taken up, and not have been permitted to meet there; therefore they Resolved the next day to put it in Execution, and accordingly they met at several Places, and got ready in the Morning, in case the King had gone abroad; the Prisoner met that Morning at *Counter's* Lodging, with several other Troopers, to make ready for the Enterprize, and there the Prisoner at the Bar, did, at that time,
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give a List of the Names that he was to Command, for he was to have one Party of those that were to Attack the Guards, of whom *Harris* was one, and *Hare* was another, and *Richardson* was another, and *Blackburne* was another, and his own name was chief, and he ordered *Harris* to go and see to get them ready, for they must go out that Morning; accordingly *Harris* did go, and got them ready, and came back and gave an account of it. His Majesty did not go abroad that day, as it hapned very Fortunately by reason of the happy discovery, so that news being brought back again, though they had made all things ready, those Preparations were put off, and they did nothing that day, and quickly after the Discovery was fully made, and made publick by the apprehension of the Conspirators.

Gentlemen, you will have this matter fully proved to you by several Witnesses, that I think there can be no room to doubt the truth of it, that there was such a Conspiracy, and that the Prisoner was as highly concern'd in it, as those that have suffered the just punishment of the Law: We will call our Witnesses to prove this, and I believe they will be able to give you an account of the whole Affair, better and more fully than I can do, or can pretend to open it.

Mr. Sol. Gen. Call Mr. *Harris* and Mr. *Porter*.

Sir. B. Shower. We oppose the Swearing Mr. *Porter*: I must beg the favour of the Court to hear us in it; if my Instructions be true, we insist upon it, that he is not capable of being a Witness, he stands Convicted of Felony: Here we have the Record, and we desire it may be Read.

Cap. *Porter*. I know nothing of the matter, that there is any such thing standing out against me.

Sir B. Shower. Then sure we are mistaken in the Man. Pray let us hear it Read.

Cl. of Ar. (Reads the Record) this is an Indictment of Murder against *George Porter*, for the Killing of Sir *James Hacket* Knight.

Mr. Att. Gen. Do you know any thing of this, Mr. *Porter*?

Cap. *Porter*. I came off with Manslaughter, and pleaded the Kings Pardon in Court.

Mr. Att. Gen. Pray Read what was done upon it.

Cl. of the Crown. Here's the Juries Verdict. *Quod prædictus Georgius Porter est Culpabilis de felonica Interfectione prædicti Jacobi Hacket, & non Cul.* As to the Murder. Here is a *Curia advisare vult*, and I suppose there was a Pardon afterwards.

Mr. J. Powel. Was he not Burnt in the Hand?

Cap. *Porter* No, I pleaded the Kings Pardon.

L. C. J. Holt. And there are several Acts of Pardon since.

Mr. Cowper. See the time when the Indictment was.

Cl. of Ar. It is the 8th of December in the 36 Year of King Charles the Second.

Sir B. Shower: We agree that he did plead the King's Pardon, and then the Case is no more than this, a Man is Convicted of Man slaughter, and the King pardons him, he still remains unqualified to be a Witness; we say, this has been the Case that has been much debated in *Westminster-Hall*, and upon Debate it has been Resolved.

Mr. J. Powel. It has been so, but always against you.

Sir B. Shower. It was in the Case of my Lord *Castlemaine* at this Barr; one of my Lords the Judges went to the Court of *Common Pleas* to ask their Opinion, and these Cases were put, in case a Man be Out-law'd of Felony and pardon'd; in case a Man be Convicted of Felony, and had the Benefit of his Clergy, and in case a Man were Convicted and not Attainted; but pardon'd upon the second Case, they were of Opinion, that the receiving the Punishment of Burning in the hand, had purg'd the very Guilt, and did set him upright by the Statute of the 15th. of Queen *Elizabeth*, they thought it did operate to that purpose; but in the case of a Pardon of a Man Attainted or Convicted, it was agreed he was not qualified to be a Witness; and *Dangerfield*, against whom the Objection was made, being burnt in the hand, was received to be a Witness; and it was only made use of against him to take off his Credit. The Record of that Case is in this Court, and I look'd upon the Print of the Tryal this day. We say that there is a Case in first *Brownlow* 47. a Man attainted of Felony cannot be of an Inquest, tho' pardon'd; and we think, he that cannot be a Jury-man, sure cannot be a Witness; there is the same Exception to his being a Witness as there is in the Case of a Jury-man, for the one ought to appear as free, and stands as clear and unsuspected, in respect of his Probity and Verity as the other; as the one is sworn to Try and Determine upon his Oath, so the other is sworn, and his Oath is to Sway and Determine the Jury, and in consequence it is all one, and upon these Reasons we hope he is not a good Witness.

L. C. J. Holt. Where is that Case in *Brownlow*?

Sir B. Shower. It is first *Brownlow* 47. and then there is 11 H. IV. 41. 2 *Bulst.* 154. there my Lord *Cook* says, if a Man be convicted of Felony and pardon'd, he cannot be a Jury-man; for though the Punishment is pardon'd, the Guilt remains, so that he is not *probus & legalis homo*, and every particular Person has an Interest in it, that they have free and clear Persons to be Jury-men and Witnesses.

Mr. Phipps. My Lord, that is the Distinction we go upon, which was taken in *Dangerfield's Case* upon the Tryal of my Lord *Castlemaine*, where the whole Court were of Opinion that a Pardon from the King only would not make him a good Witness, but if he were burnt in the hand, that by the Statute of *decimo octavo Elizabethæ*, amounted to a Statute Pardon, and set him right to all intents and purposes: and there they did take notice of that Book that Sir *Bartholomew Shower* cited of 11 of H. IV. that a Man attainted, could not be a Jury-man, tho' pardoned by the King; it was objected he might be a Witness; but Mr. Justice *Jones* said, it was the same reason if he be not fit for a Jury-man, he is not fit for a Witness; they ought to be both *probi & legales Homines*, thus the Case stood there; and that other Book of *Bulstrode* is the same it was in the Case of a prohibition for a *Modus Decimandi* where the Suggestion is to be proved by two Witnesses, it was objected he had not proved it by two Witnesses, because they were both attainted of Felony, and tho' they were pardoned, yet that did not make them good Witnesses in the Opinion of the Court.

L. C. J. Holt. This is quite another Case, it does not come up to your point, here is no Attainder, and here is Pardon upon Pardon, by Act of Parliament.

Mr. Phipps. As to that we think the Parliament Pardon is out of the Case, for if the Pardon from the King be a good Pardon, there is no Guilt for the Act of Pardon to work upon.

Sir B. Shower. My Lord, this we think to be a good Distinction as to that matter, a Man that is actually pardon'd the Punishment by the King's Pardon, and afterwards an Act of Pardon comes and Pardons all Offences, that we say does nothing, for he is not a Subject of Pardon, for he was discharged of his Punishment before.

Mr. Attor. Gen. Sure these Gentlemen are not in earnest when they make this Objection.

Sir B. Shower. When the King has once pardon'd him he is not an Offender within the meaning of the Act of Parliament, and therefore the Act works nothing as to him, and so he stands as much disabled from being a Witness, as he was before.

Mr. J. Powell. In the Case of *Cuttington* in *Hobbard*, there it is said the Pardon takes away *tam reatem quam pœnam*, &c. an Action being brought for calling a Man Thief, who had been Indicted for Felony, and convicted, and pardon'd, the Court adjudged that he ought not to be call'd so, for he was no Thief, for the Pardon had wash'd him intirely clean, and he was discharged both of the Guilt and the Punishment, and all the consequences of it.

L. C. J. Holt. Those Cases that have been put, are no Authorities at all in this Matter, for where there is a Conviction of Man-slaughter, and the Party is pardon'd, we think that Pardon of the King works in a way of Discharge as much as the Burning in the hand. I take it, it is the same thing: they admit, that will Discharge him to all Intents and Purposes, and so we think does this as effectually; for having his Clergy, and being Burnt in the hand, works by way of Statute Pardon; for the Case of a Jury-man, I take it not to be the same with this Case; but yet even in that Case, I do not think that the Party convicted, after the King hath pardon'd him, is disabled from being of a Jury; but supposing that to be so, yet there are many Cases wherein a Man may be a Witness, that cannot be a Jury-man; it is true, the Credit of such a Witness is left to the Jury, but it is no Objection against his being a Legal Witness; and it is a very strange Argument to me, that because he was pardon'd by the King, if that should be deficient that therefore the Act of Pardon should have no effect. Truly, that is to say, that the King's Pardon works so, as to have nothing left for the Parliament Pardon to work upon, and certainly it sets him so right, that to all intents and purposes he is as good a Witness as ever he was; and if any thing remained to be done, the Act of Parliament has done it and supplied the defect, but I think the King's Pardon is sufficient.

Mr. Attor. Gen. My Lord, I suppose they do not insist upon it as thinking there is any great weight in it but only for Objection sake, but we hope that notwithstanding this Objection Mr. Porter shall be sworn.

Mr. Soll. Gen. My Lord, they take this Exception at an improper time, for they speak to his Credibility.

L. C. J. Holt. No, they except to his being a Witness.

Mr. Soll. Gen. If so, your Lordship remembers a Case that was before your Lordship not long since, but in *Easter Term* last, when one was try'd

try'd at this Bar for Treason, and *Aaron Smith* was produced as a Witness, and the Prisoner took exception against him as no good Witness, because he had stood in the Pillory, and your Lordship and the Court did say that the Act of Pardon did restore him to all intents and purposes, *ad liberam Legem*.

Mr. Conyers. In the Case of the Earl of *Castlemaine*, both the Courts of *King's Bench* and *Common Pleas*, held *Dangerfield* a legal Witness, though burnt in the hand for Felony, and so was the Opinion of *Rolls*: in *Stiles Reports* 388. one that hath been burnt in the hand for Felony, may notwithstanding be a Witness.

Sir B. Shower. My Lord, in answer to that Case that was put, that after the King's Pardon for one convicted of Felony another Man has not the Liberty to call him Thief, that was an Objection in my Lord *Castlemaine's* Case, that may stand as good, and our Notion that we contend for, be good too; he cannot be impeach'd, or have Guilt imputed to him, when once the King has forgiven him, and yet that may not restore him to his intire Credit as was my Lord Chief Justice *Scroggs's* Distinction in the Case of *Dangerfield*, and as to the Case of *Aaron Smith*, that was very different, the reason in that Case was because the Crime for which Mr. *Smith* was Indicted, did not import any such scandalous Offence for which his Credit could be impeach'd.

L. C. J. Holt. No, no, we did not meddle with that we went upon the Pardon.

Sir B. Shower. But in that Case, they did not insist upon it, that he had a Pardon antecedant to the Act of Pardon, so that he was *subjectum Capax*, for the Act to work upon, he was an Offender that needed a Pardon, whereas Mr. *Porter* being pardon'd before, could not be an Offender needing a Pardon, and consequently not within the first words of the Act of Indemnity, because he was pardon'd by the King before, but he was not by that Pardon, say we, restor'd to his Credit to make him a good Witness, and the Act of Parliament did not affect him, he being not *subjectum Materiae*, as not being an Offender.

Mr. Phipps. As to Mr. Solicitor's Case of *Aaron Smith*, we agree the Act of Parliament did restore him, because he never was pardon'd before by the King, so there remained an Offence for the Parliament Pardon to work upon.

L. C. J. Holt. Do you agree that, then you may agree the other, for the Act of Parliament pardons none but those the King can Pardon generally.

Mr. Phipps. It true, my Lord, but we say that an Act of Parliament Pardon, removes those disabilities which the King's Pardon does not, for every one is in Law a Party to an Act of Parliament, and therefore no Person shall be permitted to alledge in disability of another, any Crime which he himself hath pardon'd, for that is to aver against his own Act, but 'tis otherwise in the Case of the King's Pardon.

L. C. J. Holt. Why, the very Parliament Pardon comes from the King; the King has a full Power of Pardoning, and where he does Pardon under the Great Seal, it has the full effect of a Parliament Pardon. A Pardon before Attainder, prevents all corruption of Blood, so that tho' a Man forfeits his Goods by Conviction, yet after a Pardon he is capable of having new Goods, and shall hold them without any forfeiture whatsoever, for the Pardon restores him to his former Capacity, and prevents any further forfeiture. Indeed if he had been Attainted whereby his Blood was corrupted,

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no Pardon, whether it were by the King or by the Parliament, could purge his Blood without Reversal of the Attainder, by Writ of Error, or Act of Parliament, or express words in the Act to restore Blood ; but either Pardon makes him a new Creature, gives him new Capacity, and makes him to all intents and purposes, from the time of the Pardon to be *probus & legalis Homo*, and a good Witness. Indeed this Crime might be objected against his Credit, but it is not to be urged against the sufficiency of his Evidence, that is, his being a Witness.

Mr. *Attor. Gen.* My Lord, we desire he may be sworn : (which was done.)

Mr. *Soll. Gen.* Now, Mr. *Porter*, do you give my Lord and the Jury an Account, what you know of this intended Assassination, how it came to your Knowledge, and what share the Prisoner at the Bar had in it.

Capt. *Porter.* My Lord, the first Account that I had of this Assassination, was from Mr. *Charnock*, who brought to me Sir *George Berclay* and Major *Holmes* to my Lodgings in *Northfolk-street*, where I was sick of the Gout. Sir *George Berclay* did not then particularly acquaint me with the Business, but said, he would leave it to Mr. *Charnock* to tell me what it was.

L. C. J. *Holt.* Who told you so ?

Capt. *Porter.* Sir *George Berclay*, and after that we had several Meetings, at which the Prisoner at the Bar was present, particularly at the *Globe Tavern* in *Hatton-Garden*, where it was consulted of the best ways and means to Assassinate the King as he came from *Richmond*: some were of Opinion that it was best to be done on the other side of the Water, others were of Opinion that it should be done on this side, by a Party of Men on Horse-back ; upon this Difference of Opinion, there were Persons appointed to go and view both places, I was appointed for one to go with Captain *Knightley*, and Mr. *King* went along with me, and we did view the Ground on both sides, and when we came back, we gave an Account to Sir *George Berclay*, and those that sent us, and upon our Report, Sir *George Berclay's* mind was chang'd, who was for the other side of the Water before. And he agreed to do it in the Lane that leads from *Turnham-Green* to *Brentford*, afterwards there was a Meeting at the *Globe-Tavern* in *Hatton-Garden*, and there it was agreed that the King should be Attack'd on Saturday the 15th. of February, by Sir *George Berclay* and his Party, and Mr. *Rookwood*, the Prisoner at the Bar, was to Command a Party of Men that came over from *France*, who were to Assault the Guards on one side, and I and Mr. *Charnock* were to set upon the Guards on the other side. Sir *George Berclay*, with four Men out of each Party, was to Attack the King in his Coach, and to Kill him and all that were there in it.

L. C. J. *Holt.* Who were at that Meeting ?

Capt. *Porter.* There were Sir *George Berclay*, Captain *Charnock*, Sir *William Parkyns*, my self, Major *Holmes*, Captain *Rookwood* and Captain *King*.

L. C. J. *Holt.* Where was this ?

Capt. *Porter.* At the *Globe-Tavern* in *Hatton-Garden*, upon Saturday Morning the 15th. we having two orderly Men that lay at *Kensington* to give Intelligence, had Notice brought us first that the King would go out ; *Durance*, who was one of them, used to go every Morning to Court to get us what Intelligence he could, and Sir *George Berclay* told me upon the Friday, that he should give me an Account as soon as ever he could the next Morning ; and the next Morning at my Lodging, in *Little Rider-street* in *St. James's*, he came to me, and told me, the Advance Guards was gone out, and the King's Kitchen was gone, and all was preparing for the King's going abroad, and there went a great many Noble Men and Gentlemen a Horse-back with him, and therefore he

he thought there would be no Opportunity of effecting the thing; said I. that's no Objection at all, nor any reason for putting it off, because when the Sport is over, all the Company goes away, and the King comes only in his Coach with the Guards; he said, he would give Sir George Berclay an Account of it, and he came back with Sir George Berclay and Mr. Rookwood to my Lodging, and upon repeating that Objection, and my giving the same Answer, it was agreed if the King had gone out that day to have put the Design in Execution.

Mr. Attor. Gen. Was the Prisoner at the Bar there at that time when that was agreed upon?

Capt. Porter. Yes, he was.

L. C. J. Holt. Where do you say was that Meeting?

Capt. Porter. At my Lodging in *Little Rider-street*.

L. C. J. Holt. Had you that Discourse with Sir George Berclay in the presence of the Prisoner?

Capt. Porter. Yes, Sir George, said, he doubted we could not do it, because there would go so many with the King; but I objected against that, that after the Sport was over, all the Company went away, and the King came back in his Coach; then it was agreed to go on, there was Sir George Berclay, Durant, and the Prisoner at the Bar and my self, in the Room.

L. C. J. Holt. This you say was Saturday the 15th. in the Morning.

Capt. Porter. Yes, my Lord, but I cannot say I saw the Prisoner at the Bar at any Meeting after that.

Mr. Attorn. Gen. Pray, tell my Lord and the Jury, what method you were to take in putting this Design in Execution.

Capt. Porter. There were to be so many Horse-men armed and prepared for the purpose. Sir George Berclay told me, we should be about 40 or 45 Horse-men, and they were to be divided into two Parties, and Sir George Berclay were to have four Men out of each Party, and his Business was to Attack the King, and all that were with him in the Coach. Captain Rookwood was to Command those that were come out of France to serve under Sir George Berclay, and Captain Charnock and I were to Command the other Party, and both Parties were to set upon the Guards at the same time that Sir George Berclay attackt the King's Coach.

Mr. Attorn. Gen. If the Prisoner will ask him any Questions, let him.

Sir B. Shower. Pray, Captain Porter, When was that first Meeting at the *Globe Tavern*?

Capt. Porter. It was one day in the week before the 15th.

Sir B. Shower. Was Mr. Rookwood, the Prisoner at the Bar there that day?

Capt. Porter. Yes, he was.

Sir B. Shower. How long before the 15th?

Capt. Porter. One day that week, but I cannot tell what day.

Sir B. Shower. He says it was agreed so, and so I desire to know what words Mr. Rookwood uttered at that time.

Capt. Porter. It was discoursed by every one round, which was the best way and method. I heard Mr. Rookwood, say, indeed, he believed it a very desperate thing and he was not very willing to engage in it, but when Sir George Berclay told him he should Command his Party, he replied in French--

Mr. Sol. Gen. What's the meaning of that?

Capt. Potrer. There's an end of it.

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Mr. *Attorn. Gen.* You say the Prisoner was at your Lodging *Saturday* the 15th. in the Morning. What Discourse had you there?

Capt. *Porter.* He was there upon *Saturday* in the Morning, the 15th. of *February*, and *Durant* brought an Account that the King's first Guards were gone, and the King's Kitchen was gone before, and it was expected that the King would go about eleven a Clock, but it was said, that there were a great many were preparing to go with him, and therefore it would not be convenient to do it that day; said I, that is no Objection at all, for the Nobility and Gentry go out of the Field as soon as the Sport is over, and the King used to go with a few People to Mr. ———— House at *Richmond*, and therefore it might be as well done at that time, as any time: *Durant* made that Objection at first himself, and when I made him that Answer, he went to Sir *George Berclay*, and he came back with Sir *George Berclay*, and the Prisoner was there by at the same time, and Sir *George Berclay* made the same Objection; it was at my Lodging in *Little Rider-street*, and when I told them my Reason against the Objection, as I had done before, they all agreed to do it that day.

Mr. *Phipps.* At that second Meeting, did Mr. *Rookwood* make any proposal there?

Capt. *Porter.* I only say he came with Sir *George Berclay*, and what I heard, I tell you Sir *George Berclay* made that Objection, and I gave it that Answer.

Mr. *Phipps.* But what did he say?

Capt. *Porter.* I cannot say that I heard Mr. *Rookwood* say any thing in particular, but they all agreed to do the thing that day.

Sir *B. Shower.* You remember nothing that he said?

Capt. *Porter.* Sir *George Berclay*, said, we will go and prepare, and he went away with him.

Sir *B. Shower.* Pray, when did Sir *George Berclay* come into *England*?

Capt. *Porter.* Truly, Sir, I don't know that; the first time that I saw him after he came, Mr. *Charnock* him brought to my Lodging in *Norfolk-street*, but before that, Mr. *Charnock*, told me, he was come into *England*.

L. C. J. *Holt.* Hark you, Mr. *Porter*, when you came back from viewing the Ground before the first *Saturday*, and you said you made your Report, and then it was agreed that it should be done at such a place; Do you say the Prisoner was there?

Mr. *Attorn. Gen.* No, my Lord, he does not say so. Do you say Mr. *Rookwood* was there at that time?

Capt. *Porter.* No, my Lord, I don't say so.

Sir *B. Shower.* I am sure he did not say so before; and besides, your Lordship will observe there is no such Overt-Act as that laid in the Indictment against the Prisoner, that Mr. *Porter* made his Report upon the view, that only concerns Mr. *Knightley*.

L. C. J. *Holt.* No, that is not an Overt-Act, I agree it, but I only ask the Question, whether the Prisoner was there.

L. C. J. *Treby.* If it were an Overt-Act laid in the Indictment, it would not affect the Prisoner, because the viewing of the Ground, and making the Report, is Captain *Porter's* act, and it must be the consulting and debating afterwards that must affect the Prisoner, if he be concern'd.

Mr. *Conyers.*

Mr. *Congers*. The Meetings and Consultations that are laid in the Indictment are the Overt Acts.

Mr. *Soll. Gen.* Well, if they have done with Captain *Porter*, we desire Mr. *George Harris* may be sworn.

Sir *Barn. Shower*. My Lord, we beg leave to oppose Mr. *Harris's* being sworn; here was a Proclamation that did take notice of this barbarous Conspiracy to assassinate the King, and the Proclamation did signifie, That the King had received information of several Persons concerned in that Conspiracy; and for the encouragement of taking those so accused, he did promise a Thousand Pounds reward for the taking of any of the Conspirators; and in the conclusion of the Proclamation there is a Clause, *That if any of the Conspirators should discover or apprehend any of the other Persons that were therein named, so as that they should be brought to condign Punishment, such Conspirator so discovering should receive a Thousand Pounds reward for any of the other Persons apprehended, and his own Pardon.* My Lord, we have a Witness here ready to prove that this was Mr. *Harris's* Case; he was himself in the Proclamation, he did actually discover Mr. *Rookwood*, the Prisoner at the Bar, and was instrumental in the taking of him; and consequently upon this Clause of the Proclamation, if he be brought to Justice, then is Mr. *Harris* intitled to this Reward and his Pardon; and consequently he has such an Interest and Advantage to himself as will prevent his being a Witness. It is true, indeed, where it is at the King's Suit, in a capital Case, it is pretty hard to say that a man has an Interest; but we think, as this Case is circumstantiated upon this Proclamation, that the same Objection lies against him as would do if this were a civil Cause; if we shew how he is to have an Advantage by the event of this Cause, then he is not to be admitted a Witness.

L. C. J. *Holt*. Did he apprehend any body upon the Proclamation?

Sir *B. Shower*. Yes, he apprehended Mr. *Rookwood* himself, or was the cause of it, and thereby is intitled to the Reward and his Pardon.

Mr. *Phipps*. That upon which we ground our Objection is the different penning of the Proclamation; for if any one that is not a Conspirator do but discover and apprehend any of the Persons named in the Proclamation, he is entitled to the Thousand Pounds; but the Conspirators themselves must go further; for a bare Discovery and Apprehending any of their Accomplices will not entitle them to the Reward mentioned in the Proclamation, but they must discover and apprehend their Accomplices so as they be brought to Justice before they can be entitled to the Reward: And to be brought to Justice for any Crime, is in common understanding to be brought to such Punishment as the Law inflicts for the Offence. Now Mr. *Harris's* Case is this, he discovered Mr. *Rookwood*, and went with the Guards to the Compter and seiz'd him: And if Mr. *Rookwood* be not convicted, Mr. *Harris* is not to have any thing for his pains; but if he be convicted, Mr. *Harris* is entitled to the Thousand Pounds and his Pardon. And therefore surely Mr. *Harris* cannot be admitted an Evidence against Mr. *Rookwood*, since he is to receive so great a Benefit by his Conviction. Upon an Indictment for a usurious Contract, the Person whose Deed it is cannot be a Witness, because 'tis to avoid his own Act: So in an Indictment for Perjury, on the

the Stat. 5. Eliz. the Party injured by the Perjury cannot be a Witness, because he is to have half the Forfeitures.

Mr. Att. Gen. I suppose they will make out their Objection before they expect an Answer from us.

Sir Bar. Shower. I hope your Lordship will not put us to prove a Copy of the Proclamation from the Inrolment, but that we may have the same favor as in the Case of the Statue-Book, that the Print of it may be allow'd for Evidence.

Mr. Att. Gen. My Lord, we will not stand with them for that, we know they are mistaken throughout, we consent the Proclamation should be read.

Cl of Arr. Reads,

By the King a Proclamation.

William R.

WHereas His Majesty has received information upon Oath, that the Persons herein after named, have with divers other wicked and traitorous Persons entered into a horrid and detestable Conspiracy to assassinate and murder His Majesty's sacred Person, for which cause several Warrants for High Treason hath been issued out against them, but they have withdrawn themselves from their usual places of abode, and are fled from Justice: His Majesty has therefore thought fit by the Advice of his Privy Council to issue his Royal Proclamation, and His Majesty does hereby command and require all His loving Subjects to discover, take, and apprehend James Duke of Berwick, Sir George Barclay, Major Lowick, George Porter, Capt. Stow, Capt. Walbank, Capt. James Courtney, Lieuten. Sherborne, Brice, Blair, Dinant, Chambers, Boile, George Higgins, and his two Brothers, Sons to Sir Thomas Higgins, Davis Cardell, Goodman, Cramburne, Keyes, Pendergoss, alias Prendergrafs, Bryerly, Trevor, Sir George Maxwell, Durance, a Fleming, Christopher Knightley, Lieutenant King, Holmes, Sir William Parkyns, Rookwood, wherever they may be found, and to carry them before the next Justice of Peace or chief Magistrate, who is hereby required to commit them to the next Goal, there to remain until they be thence delivered by due course of Law. And His Majesty doth hereby require the said Justice, or other Magistrate, immediately to give notice thereof to Him or His Privy Council. And for the prevention of the going of the said Persons, or of any other, into Ireland, or other parts beyond the Seas, His Majesty does require and command all His Officers of the Customs, and other His Officers and Subjects of and in the respective Courts and Maritime Towns and Places within His Kingdom of England, Dominion of Wales, and Town of Berwick upon Tweed, that they and every of them in their respective Stations and Places, be careful and diligent in the Examination of all Persons who shall pass or endeavor to pass beyond the Seas, and that they do not permit any Person whatsoever to go into Ireland, or other places beyond the Seas, without a Pass under His Majesty's Royal Sign Manual until further Order. And if they shall discover the said Persons above-named or either of them, then to cause them to be apprehended and secured, and to give notice as aforesaid. And His Majesty does hereby

hereby Publish and Declare to all Persons who shall Conceal the Persons above-named, or any of them, or be aiding and assisting in the Concealing of them, or furthering their Escape, That they shall be proceeded against, for such their Offence, with the utmost Severity, according to Law. And for the Encouragement of all Persons to be Diligent and Careful in endeavouring to Discover and Apprehend the said Persons, We do hereby further Declare, That whosoever shall Discover and Apprehend the Persons above-named, or any of them, and shall bring them before some Justice of Peace, or chief Magistrate, as aforesaid, shall have and receive, as a Reward, the Summ of One thousand Pound; which said Summ of One thousand Pounds, the Lords Commissioners of His Majesty's Treasury are hereby Required and Directed to pay accordingly. And if any of the Persons above-named shall Discover and Apprehend any of their Accomplices, so as they may be brought to Justice, His Majesty does hereby Declare, That every Person making such Discovery, shall have His Majesty's Gracious Pardon for his Offence, and shall receive the Reward of One thousand Pound, to be pay'd in such manner as aforesaid.

Given at our Court at Kensington, the 23d. Day of February, 1692.
in the Eighth Year of our Reign.

GOD SAVE THE KING.

Mr. Phipps. My Lord, The different Penning of the Clauses is not only in that Proclamation, but it is the Language of every Proclamation that has gone out for the Apprehending any of the Conspirators.

Mr. Att. Gen. My Lord, All that we say in answer to this Objection, is, That *Mr. Harris* is not nam'd in that Proclamation.

L. C. J. Holt. What say you to that, *Sir Bartholomew Shower*? He is not named in the Proclamation: And so if he hath Discovered and Apprehended the Prisoner, he has earn'd his Money, whether he be Convicted or not, because *Rockwood's* Name is in the Proclamation, tho' his is not.

Mr. Phipps. Then, My Lord, with humble Submission, here is another Proclamation wherein he is nam'd, we desire that may be read.

Mr. Sol. Gen. And when it is read, it will be as little to your Purpose as the other.

Mr. Att. Gen. Let them read what they please, we need say nothing at all to it.

L. C. J. Holt. Certainly upon this Proclamation there's no Objection; for he is intitled to his One thousand Pound already, tho' *Rockwood* be never convicted.

Mr. Phipps. But is he not by this Proclamation which mentions his Accomplices, intitled to his Pardon? If so, he swears to secure himself.

L. C. J. Holt. By the Apprehending and Discovering, he's intitled to his Pardon.

Mr. Phipps. But not without he be brought to Justice; that is to say, till he be convicted; therefore he cannot be an Evidence to convict him.

L. C. J. Holt. That is, as to any that are there named, if any of them Discover and Apprehend one another, it must be so as that they be brought to Justice: But if any Person that is not named there does Apprehend any that is, he is intitled to the One Thousand Pound, barely by the Apprehension.

Mr. Phipps. Then there is another Proclamation where they are both named, as *Mr. Rookwood* tells me.

Sir B. Shower. My Lord, We will set this Matter right ; we will show the other Proclamation, in which, if I am rightly inform'd, for I have not read it, *Mr. Harris* is nam'd.

Mr. Att. Gen. If you have not read it, I would advise you not to trouble the Court with it ; for you will find the latter part is restrain'd to Three or Four particular Persons, of which he is none.

Rookwood. I am named in the Proclamation.

Mr. Att. Gen. Ay, but read the latter part of it, and you will find you are not nam'd in that Clause that they referr'd to : You need not read the former part of the Proclamation, we agree the Prisoner is named there ; but only look towards the bottom, which is the Clause that they refer to.

Cl. of Arr. (Reads) *And we do hereby further Declare, &c.*

Mr. Att. Gen. They have not considered the Proclamation, and therefore make an Objection of they don't know what.

Sir B. Shower. We are in your Lordship's Judgment.

L. C. J. Holt. For what ? See if you can make or state a Case for our Judgment.

Sir B. Shower. *Mr. Rookwood* is mention'd in the first Proclamation, and *Harris* is not, but there are the Word Accomplices : He is likewise mentioned in the last Proclamation, but not in the last Clause of it. I confess, if he had, it had been plain it would have taken off his Testimony ; but now we must submit it to you, whether he is not an Interested Person, and consequently no good Witness.

L. C. J. Holt. Truly I do not see any colour for the Objection. Is he not as well intituled to his One thousand Pound, tho' *Mr. Rookwood* had never been try'd, by the bare Apprehending of *Mr. Rookwood*, as if he was Convicted ?

Sir B. Shower. No, my Lord ; because the Words are so as he may be brought to Justice.

L. C. J. Holt. That is not so, as to any Person that apprehends one mentioned in the Proclamation, if the Person that apprehends be not mention'd in it, and named himself ; if any one that is not mention'd apprehend one that is mention'd, he is intituled, by the Apprehension, to the One thousand Pound. If any one that is mention'd apprehend another, then he is to bring him to Justice ; now *Mr. Harris* is not named in this Proclamation, and so, as to the One thousand Pound, he stands in the same Condition as any other Person that Discovered or Apprehended one of the Persons there nam'd.

Sir B. Shower. But it seems he was one of the Conspirators, because he is himself described in another Proclamation.

Mr. Att. Gen. If it were so, it would not be material, nor any manner of Objection ; but as they have made their Objection upon these Proclamations, we think there is nothing for us to give an Answer to.

Mr. Comper. Nay, my Lord, if it were so, will *Sir Bartholomew Shower* say his Client is not brought to Justice, unless he be Convicted ? I am sure the Words *Convicted* or *Attainted*, are not in the Proclamation.

L. C. J. Holt. There is nothing in it ; you must swear *Mr. Harris*, which was done accordingly.

Mr. Sol. Gen. Will you give an Account to my Lord and the Jury, what you know of this Conspiracy against the King's Life, from the first

first time you were acquainted with it, and what hand the Prisoner at the Bar had in it.

Mr. Att. Gen. Pray give an Account of the whole thing, your coming over, and who sent you, and upon what Errant, and the whole that you know of this Conspiracy.

Capt. Harris, Upon the 14th. of *January* last, the French Stile, New Stile, I was at *St. Germain's*, where I was sent for by King *James*, and was ordered to wait his Dinner till it was over, and accordingly I did wait till his Dinner was over, and then I came in, and *Col. Parker* was with him, and one *Mr. Hare* who is also mentioned in the Proclamation, was there also: the King told me he was sensible I had served him well, and now he had an Opportunity of doing something for me; he told me he would send me into *England*, where I should be subsisted, and I was to follow the Orders of *Sir George Barclay*, and accordingly he ordered me Ten Lewidores to be paid by *Mr. Carroll*, who is Secretary to the late Queen, and *Col. Parker* went along with me, and *Mr. Hare*, to *Carroll*, and told him he came from the King, and we had the Lewidores, and we went to *Calais*, in order to our coming over hither: but we were told if we were Wind-bound, that the Money we received would not bear our Charges; there was Orders given for our further Subsistence at *Calice*, to the President there. Accordingly we came to *Calice*, and the Wind did not serve us for 8 or 9 days; and while I stay'd there, the Money that I spent at *Calice* was paid by the President of *Calice*, *Monsieur Latour*. Afterwards I Land-
ed in *England*, near *Romney Marsh*, as I was told, and I came to the House of one *Hunt*, and he provided me and my Comrade with a Couple of Horses; and coming from thence, I came in the first place to one *Tucker's* an Apothecary in *Sandway*, and next from thence, we came to *Rocheſter*, to *Charles Crofts's*, and from thence in a Coach to *Graveſend*, and from thence by Water to *London*: that night we lay in *Grace-Church-street* at an Inn, it being night, the Night-Tyde, and something late. The next day I came to a Lodging at an Acquaintance of my Comrades, *Mr. Hare*, at the *Unicorn* in *Brownlow-street*, one *Mr. Wateman's*. The next night I went to look for *Sir George Barclay*, whom the King told me I should certainly find by such a Sign of a White Handkerchief hanging out of his Pocket, on *Mondays* and *Thursdays*, in *Covent-Garden*, where his Walk was to be in the Evening, because he was not to appear in the day-time openly. It happen'd that upon *Monday* night after I came to Town, I went there, and did not find *Sir George Barclay* according to the King's Direction, which I admired at; but there was one *Mr. Berkenhead*, who told my Comrade, a Day or two after, That *Sir George Barclay* would needs speak with me, and accordingly I met with him; and he asked me how the King, Queen, Prince, and Princess did, and I told him they were very well; I told him I was appointed to attend him, and obey his Orders. He told me he had no Money at present, but in two or three Days he would send some; and so he did, by *Major Holmes*. I had Five Shillings a Day for subsistence, and I had no Horse; and when I had a Horse, it was Six Shillings a Day; after which rate I had subsistence for a Month at Five Shillings a Day, Guinea's going then at Thirty Shillings. *Major Holmes* pay'd me the Money by *Sir George Barclay's* Order, as he told me, and he afterwards gave me a Guinea, and that was the first *Saturday* when the Assassination was design'd;
for

for that we told him we wanted Money, and it was not reasonable we should take our Horses out of the Stable before we pay'd for them : And I met Sir *George Barclay* several times at *Covent-Garden*, and he told me it was a suspicious Place, and desired me not to come any more there ; but when he had any particular Orders to give me, he wou'd give me notice of it where I shou'd meet him ; and accordingly I did meet him several times.

Mr. Att. Gen. Now Sir, will you tell what you know as to the Prisoner at the Bar.

Capt. Harris. As to Mr. *Rookwood*, the *Saturday* that the Assassination was design'd to be, the first time that I knew of it, I met Mr. *Rookwood*, at one Mr. *Burck's* Lodging, where he was up, and I saw him in a great Hurry and some Consternation, and in came Mr. *Bernarde* ; I ask'd him the meaning of it, and what they were going about ; and Mr. *Rookwood* told me, If I wou'd go down to Captain *Counter* I shou'd know ; accordingly I went, and to the best of my remembrance, he gave me a little Note to Captain *Counter*, but that I am not positive in. I went to Captain *Counter*, and as soon as ever I came, he told us, We must be immediately ready to go to *Turnham Green*.

Mr. Att. Gen. Where was that ?

Capt. Harris. At the *Woolpack*, that was the Sign——as near as I remember. Mr. *Hare* and I were ordered together to come there, and there was Mr. *Hungate*, who had been there some time, and when I came in, Sir *George Barclay* did declare Laughing, *These are my Janissaries* : And he talk'd something of bringing the Garter, and of attacking the Coach ; but he went out of the Room, and afterwards he came in and declared, *We were all Men of Honour, and that the Business we were going about, was to attack the Prince of Orange* ; but *Durant* came in after that, and said, *The Prince of Orange did not go out that Day*. When he talk'd of attacking the Prince of Orange, I was very much startled, not knowing any thing of it before ; and I came the next Morning to Mr. *Rookwood*, and ask'd him if we were to be the Murderers of the Prince of Orange, says Mr. *Rookwood* to me, *I am afraid we are drawn into some such Business ; but if I had known of it before I came over, I should have beg'd the King's Pardon at St. Germain's, and not have come over hither* ; and said I, *This is very fine, we have serv'd to a very good purpose, to be sent over upon such an Errand and Account*. After this Mr. *Rookwood*, and Mr. *Lovick*, and I, had a Meeting at *Red-Lyon-Fields*, where we did discourse about the Matter. I did often declare against it, That it was so barbarous a thing, that no Man of Honour almost wou'd be guilty of it, but Major *Lovick* answered, That we were to obey Orders, for sure Sir *George Barclay* wou'd not undertake a thing of that nature without Orders.

Mr. Att. Gen. Pray what said Mr. *Rookwood*.

Capt. Harris. He own'd it was a barbarous thing ; but he was sent over to obey Sir *George Barclay's* Orders, which he had several times declared he was resolved to do ; upon that we parted : so afterwards I came to Mr. *Rookwood's* Lodging ; it was the *Saturday Morning* I came to him, and so went to Sir *George Barclay's* ; while he was there, Mr. *Rookwood* gave me a Note, naming so many Names, particularly Mr. *Hungate*, Mr. *Hanford*, Mr. *Hare*, and his own Name at top, not the Name that he is Arraigned by here ; but a sham Name that he had, as the rest of us all had sham Names, which at that time we went by.

L. C. J. Holt.

L. C. J. Holt. What was your Name?

Capt. Harris. My Name was *Jenkins*.

L. C. J. Holt. Who gave you that Name?

Capt. Harris. King *James* at *St. Germain's*, and he gave *Mr. Hare* the Name of *Guiney*, and *Mr. Rockwood's* Name was *Roberts*. King *James* told us in his Bed-Chamber, We were to go by those Names.

Mr. Att. Gen. Pray Sir, what did *Rockwood* say to you when he gave you that List?

Capt. Harris. He told me, he was to go to *Turnham Green*, and I was to go along with him, and says he to me smiling, *You shall be my Aide de Camp*; and get the rest of the Gentlemen ready, and accordingly I went to look for several of the Persons——particularly for *Mr. Blackburn*: When I came back again, I found him lying on his Bed, and that *Sir George Barclay* had told him the Prince of *Orange* did not go out that Day, and from thence we went to Dinner, where Major *Lowick* din'd with us, and *Mr. Bernarde*, and Major *Lowick* seeing me in a heat, ask'd me, Why I was in such a Sweat, I told him I were getting those Men ready for *Mr. Rockwood*, who had made me his *Aide de Camp*; says Major *Lowick* to me, You may very well do it; for you have six Shillings a Day allow'd you, and I have nothing; I bring two Men at my own charge: said I, Major *Lowick*, I wonder you don't apply your self to *Sir George Barclay*, and then, I believe you may be sublisted too. He answered me, He did not think it worth the while to trouble him, since he hath never spoke to him of it before, and *Rockwood*, and *Bernarde*, and *Lowick*, and my self, several times met in *Red-Lyon-Fields*, and talk'd of attacking the Prince of *Orange*.

Mr. Att. Gen. Who did?

Capt. Harris. *Rockwood*, *Bernarde*, *Lowick*, and my self.

Mr. Att. Gen. Pray Sir, let me ask you one Question. Where was your Horse at first?

Capt. Harris. At first it was at my Lord *Feversham's* Stables, as they told me, in *Some-set-House*.

Mr. Att. Gen. Where were the other Persons Horses?

Capt. Harris. There was *Mr. Hungate's*, and *Mr. Hare's* Horses in the same Place, at the same time, as they told me.

Mr. Att. Gen. How came you by your Horse there?

Capt. Harris. Major *Holmes* did deliver my Horse, and committed it to my care, and I carry'd it thence to another place.

Mr. Att. Gen. Did you observe there was any more Horses there?

Capt. Harris. I believe there was Five or Six, as near as I can guess.

Mr. Att. Gen. Do you know where *Rockwood* was to have his Horse?

Capt. Harris. He had a Horse; but whence he had it I don't know.

Mr. Att. Gen. Had you any Arms delivered you?

Capt. Harris. Yes, I had, by *Capt. Counter*.

Mr. Conyers. Were you at no other Place together that *Saturday* Night, the 22d. of *February*, because you say you din'd together?

Capt. Harris. Yes, we were at the *Bear Tavern*.

Mr. Conyers. What Discourse pass'd between you there?

Capt. Harris. They were talking about the Assassination; but what any particular Person said, I cannot tell.

Mr. Conyers. Pray who were there?

Capt. Harris. There was *Mr. Knightly*, *Capt. Rockwood*, and *Mr. King*; and *Knightly* went out and came in again, and declared,

red, we must have a great deal of care of our selves, or we shou'd be taken up; and he whisper'd it first, and afterwards I ask'd him what it was, and he told me, and said, *We must have a care of our selves*: Says Mr. King, staring this way with his Eyes, *Surely God Almighty is on our side*; and so we parted.

L. C. J. Holt. When was this?

Capt. Harris. This was the Night of *Saturday* the 22d. when it was discovered; for some of them were taken up the next Day.

Mr. Att. Gen. Was *Rookwood* there at that time at the *Bear-Tavern*?

Capt. Harris. I cannot possibly say whether he was or not.

Mr. Att. Gen. What Discourse had you there?

Capt. Harris. We talk'd of Assassinating the King; but what it was in particular, I cannot tell.

L. C. J. Holt. Was *Rookwood* there?

Capt. Harris. Yes, I believe he was; but I cannot positively say.

L. C. J. Holt. You say it was the last *Saturday* that the King was to go abroad, that you apprehended you were discovered?

Capt. Harris. Yes, we apprehended we were discovered before that; for Mr. *Lowick* told me, That Three or Four Days before, in that Week, that his Name, and one *Harrison's*, were given into the Council, and another, and another, Two or Three of them, as he told me; I think, Three or Four; and upon that Account Major *Lowick* went from his Lodging, and did not lie at his Lodging the Night before; and I came to Major *Lowick*, and he told me the same thing at the *King's-Arms Tavern*.

Mr. Att. Gen. Can you Remember what Discourse you had that *Saturday Night*?

Mr. Cowper. You say that on *Saturday* the 22d. Mr. *Rookwood* gave you the List.

Capt. Harris. I do not say it was the 22d. for I cannot swear to the Day of the Month; but it was the Second *Saturday* that we were to have gone about this Business.

Mr. Cowper. You say he gave you a List of Names: Pray, when he gave you that List, what Discourse happened in the Room, just before, or after the giving of the List?

Capt. Harris. Sir, I think I told the Court that before.

Mr. Cowper. Sir, I desire you would repeat it.

Capt. Harris. My Lord, I humbly desire to know whether I am to answer that Gentlemen that Question?

L. C. J. Holt. Yes, you are to answer, being upon your Oath, and to tell the whole Truth.

Mr. Cowper. I ask him the Question so fairly, what Discourse introduced the giving of the List, and what followed upon it, that I perceive this Gentleman does not know which side I am off.

Capt. Harris. Mr. *Rookwood* said we were to go to *Turnham-Green*; and he told me, that I was to be one of his Party, that we were to attack the Prince of *Orange*.

L. C. J. Holt. You say you were to be one of his Party: Pray was it there that he told you, you should be his *Aid de Camp*.

Capt. Harris. Yes, he did tell me I was to be his *Aid de Camp*?

Mr. Phipps. Whose Hand-writing was that List?

Capt. Harris. I cannot tell, I had it from that Gentleman.

Mr. Phipps. But whose Writing was it?

Capt. Harris:

Capt. Harris. Indeed I know not his Hand-writing, and therefore cannot tell whose it was : He is for his Life, but I believe he cannot deny any thing that I have said, I suppose not : I shou'd be very sorry to accuse Mr. *Rookwood* of any thing that was not true.

Mr. Phipps. Pray whose Names were in that List ?

Capt. Harris. I have mention'd Mr. *Hare*, Mr. *Hanford*, Mr. *Blackburn*, my self ; and you, Mr. *Rookwood*, had your own Name at top.

Rookwood. What is that *Blackburn* ?

Capt. Harris. He is a *Lancashire* Man.

Rookwood. It's a very strange thing I should give you a List with a Man's Name that I don't know ; I declare it, I know no such Person.

Capt. Harris. Mr. *Rookwood*, I believe you are very sensible I do not accuse you of any thing that is not true.

Mr. Phipps. When did you see that List last ?

Capt. Harris. He gave it into my Hands, and had it from me again, or I threw it away afterwards.

Rookwood. But you that were to be an Evidence, ought to have kept it to justify your Evidence.

Capt. Harris. Truly I did not intend to have been an Evidence at that time.

Mr. Att. Gen. If they will ask him any Questions let them.

Sir B. Shower. No indeed, I will ask him no Questions.

Mr. Att. Gen. Then, my Lord, we have another piece of Evidence which we wou'd offer to your Lordship, which is not direct Evidence against the Prisoner, but only to prove a Circumstance or two of what has already been sworn : We do acknowledge, my Lord, it does not affect Mr. *Rookwood*, but only to strengthen and confirm what they have sworn.

Sir B. Shower. With submission we hope it will not be Evidence fit to be given as to the Prisoner at all ; for because a Man may swear true in the particular Circumstance of a thing, that therefore he swears true what he swears against the Prisoner, I think is no Consequence in the World.

L. C. J. Holt. It is a thing distinct, and foreign to the Matter, as to Mr. *Rookwood*.

Mr. Att. Gen. My Lord, we do not say it directly affects Mr. *Rookwood* ; but when your Lordship has heard it, we shall submit it to you, how far it confirms even the Evidence given against him.

Mr. Conyers. My Lord, we say the Prisoner was to have his Horse from *Somerset-House* ; and that there were Horses plac'd there for that purpose we are going to prove.

Mr. Att. Gen. My Lord, It is one entire Conspiracy, in which every one had his part ; one was to have his Horses and his Party in one place, and another in another : Now that there were at such time such Horses at *Somerset-House*, and those Horses were delivered out from *Somerset-House*, is certainly a Confirmation of the Truth of what the Witnesses have said.

L. C. J. Holt. It is so. If that be it you offer, it is very material.

Mr. Conyers. We shall prove, That upon the Disappointment on the first *Saturday*, the 15th. of *February*, they were to be ready against the 22d. and you will hear how the Horses were disposed of in the mean time. Call *Chamberlain*, *Maskel*, and *Allen*.

Mr. Att. Gen.

Mr. Att. Gen. Call any one of them, I believe it is enough.

Mr. Chamberlain appeared, and was sworn.

Mr. Att. Gen. Pray will you give my Lord, and the Jury an Account what you know of any Horses that were brought to *Somerset-House* about *February* last, and how long they stay'd there?

Chamberlain. There was Six Horses.

Mr. Att. Gen. Who brought them in.

Chamberlain. They were sent in by some Persons in *Mr. Lewis's* Name.

Mr. Att. Gen. Had you any Direction to take care of them?

Chamberlain. *Mr. Lewis* sent in a Note to take care of them for a Night or two.

Mr. Att. Gen. Who carried them away?

Chamberlain. I cannot tell: Some People came to see 'em that I never saw before, and they took care of them; I know not who they were, and I never saw them since.

Mr. Att. Gen. What time was it that they came for them?

Chamberlain. It was about the middle of the Day.

Mr. Att. Gen. What Month was it in?

Chamberlain. I think it was much about the latter end of *February*, to the best of my Remembrance.

Mr. Att. Gen. How long was it before the Plot was discovered.

Chamberlain. It was about a Week, or a small matter, before the Plot was discovered, to the best of my knowledge.

Mr. Att. Gen. How long stay'd the Horses there at *Somerset-House*?

Chamberlain. Three of them staid a Night or two; but the other Three about a matter of a Week or Ten Days.

Mr. Att. Gen. Who own'd those Horses?

Chamberlain. They were sent in, in *Mr. Lewis's* Name; but who own'd them I cannot tell indeed.

Mr. Conyers. Then swear *John Allen.* (Which was done.)

Pray tell my Lords, and the Jury, what you know concerning any Horses about the time of the Breaking-out of the Plot.

Mr. Att. Gen. We mean in *Somerset-House* Stable.

Allen. There were Seven Horses came in.

Mr. Conyers. Who brought them?

Allen. There was Six in the first place; one came in afterwards, in the Evening.

Mr. Conyers. By whose Order were they brought there?

Allen. By *Mr. Lewis's* Order.

Mr. Att. Gen. How long did they stay there?

Allen. Some of them stay'd there several Days; Three of them went away the next Day, as I think.

Mr. Conyers. Do you remember about what time those Horses were brought thither?

Allen. They were brought there I believe about Seven or Eight Days before the Plot broke out.

Mr. Att. Gen. My Lord, we only call these Witnesses to confirm the Testimony of the others, that there were such Horses there at that time, and for the present we rest it here.

L. C. J. Holt. Then, Gentlemen, what say you to it for the Prisoner?

Sir B. Shower. If your Lordship please, we are of Counsel for the Prisoner

Prisoner; and that which we are to insist upon is this, which we submit to your Lordship's Judgment. In the first place, whether here be two Witnesses against the Prisoner to prove this Treason according to the Statute of *Edw. 6.* which requires two Witnesses in High-Treason, and Lawful Ones; but that in the first place we say there are not two Witnesses at all, at least not to any Overt-Act that is laid in this Indictment. As to what Captain *Porter* says of what past between him and *Durant*, the Dialogue between them where *Rookwood* was present, we are in your Lordship's Direction; and we doubt not but the Jury will take it into their Consideration, how far that affects the Prisoner; that he shall not be concern'd in any Transaction between Mr. *Porter* and any other Persons: none of their Declarations, none of their reasonable Practices, can be imputed to or affect him in any way whatsoever. Now all that Captain *Porter* says of Mr. *Rookwood*, is, that he was once at the *Globe-Tavern*, and there was a Discourse about this Matter; and then he tells your Lordship of a Dialogue between him and *Durant*, and Account of what passed between them; but he does not say any thing of Mr. *Rookwood* being any ways concern'd in the Matter, but only that he dropt this Expression, It was a Desperate Adventure, a Dangerous Enterprize, and he seem'd against it, but in the end he concluded with something in *French*, which what they are, and what they mean, we must submit to your Lordship and the Jury: he interprets it, when Sir *George Barclay* said he must have a share in it, then *Rookwood* replied, There's an end of it. But there is not one Word of Agreement sworn to that Mr. *Rookwood* spoke, to shew his Consent. There is but one time more that Mr. *Porter* swears to, about the Prisoner at the Bar, and that is, at his Lodging in *Little Rider Street*; for as to the other Consults, Mr. *Rookwood* was not present there: it seems there was a Discourse about the Affair, but that *Rookwood* said nothing, but went away: there was not so much as the least Intimation of an Agreement to any such Design, or Approbation of what was agitated in the Company: and we insist upon it as to this in point of Law, that it amounts to no more than Misprision of Treason at most. My Lord, I will not now contend about Notions, nor will I argue whether Consulting and Agreeing be Evidence of an Overt-Act; I submit to your Lordship's Directions, notwithstanding the Variety and Difference of Opinions that have been.

L. C. J. Holt. Sir *Bartholomew Shower*, I know not what Variety of Opinions you mean; there have been some Discourses in Pamphlets I agree, but it was always taken and held for Law, that Consulting and Agreeing was an Overt-Act.

Sir B. Shower. Here is no Evidence of any Agreement.

L. C. J. Holt. Pray let us hear what you say to that.

Sir B. Shower. It is not the being present where Traytors do Consult and Conspire the Death of the King, unless they actually agree; nor is it Evidence sufficient to guide or prevail upon a Jury's Conscience, to affirm upon their Oaths, that such a one is guilty of High-Treason, because such a one was there and said nothing at all; for the not discovering afterwards, nor accusing, is no Evidence at all against Mr. *Rookwood*. As to Mr. *Harris*, he gives you an account of a great deal that does not affect Mr. *Rookwood*, neither all that past at St. Ger-

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mains,

mains, nor in their Journey into *England*, for all that may be true, and yet the Prisoner no way concern'd in it. As to what he affirms of the Prisoner, we shall submit it to your Consideration: what it amounts to, and all that his Deposition comes up to, is, That Mr. *Rookwood* complain'd that he was to obey implicitly Sir *George Barclay*'s Orders; and *Harris* gives an account but of one particular time that Mr. *Rookwood* undertook or did agree to be concern'd in this Matter; it was but once, and that was, when he gave him the Note of those that were to go to *Turnham-Green*, and that he was to be his *Ayd du Camp*: and as to that, we shall give you an account by Witnesses whom we shall call, that these two Witnesses ought not to be believed as to what they have sworn, tho they do not come up to make two Witnesses according to Law upon this Indictment: what they have said as to this Man is not credible, tho they may speak true as to others; and no doubt there was a barbarous Conspiracy; it appears there was such, beyond all Exception and Contradiction; and the Persons that have been Condemn'd as Conspirators have acknowledg'd it: but, my Lord, that which is now before your Lordship and the Jury, is, to enquire whether the Prisoner is concern'd in this Affair at all, and how far; and we hope the Jury will be of Opinion he is not concern'd. The Heinousness of the Crime, and the Aggravations of it, being to be abhorred by all Mankind, we think ought not to sway with the Jury, nor influence their Judgments to believe a Witness ever the sooner in accusing any other Person; it ought rather to have a contrary Allay, for the greater the Crime is, and the farther off from having any tolerable Opinion in the World, they ought to expect the greater Proof; and no one is to be presum'd guilty of such an Act, without very sufficient Evidence of it; and the greater the Crime, the Proof ought to be the more positive and undeniable: it is not their being plainly positive that is sufficient, but whether it is such that is good in Law; and about that we are sure your Lordship will give true Directions in point of Law: and whether the Witnesses be credible or no, must be submitted and left to the Jury, after we have call'd some Witnesses who will give you an account of their Reputation.

Mr. Phipps. My Lord, we humbly insist there are not two Witnesses, such as the Law requires, to prove the Charge upon this Indictment against the Prisoner: The two Overt-Acts that touch Mr. *Rookwood*, are first Consulting and Agreeing how to Kill the King; the other is the finding Arms and Horses for that purpose: but as to this latter, the finding Arms and Horses, there is not one Evidence that comes up to it: and as to the former, the Consultations, whether there be sufficient Evidence that comes up to that, is very much a Question with us: but we say, with Submission, there are not two Witnesses in that case; for Mr. *Porter* says only what he was told by Sir *George Barclay*, that Sir *George* propos'd this Matter; but withal he tells you, that when Sir *George Barclay* propos'd it, and Mr. *Rookwood* was inform'd what the Design was, he was so far from Conspiring, Consulting, or Agreeing to do it, that he said it was a barbarous Act, and he recoil'd at it. Then at last says Sir *George Barclay*, You must command a Party.

L. C. J. Holt. Well, and what said *Rookwood* then?

Mr. Phipps. *Porter* says, he then said, There's an End of it. Now, my Lord, what Evidence is this of a Consultation and Agreement?
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and this is all that *Porter* says. As to what *Mr. Harris* says, we are to consider whether the Lift given to him be an Overt-Act; and there the Point in question is, whether that Lift can be given in Evidence against *Mr. Rookwood*, upon this late Act of Parliament, as an Overt-Act, it not being laid in the Indictment? There is indeed an Overt-Act of a Lift laid in the Indictment, as given to *Cranburne*, but none as given to *Mr. Rookwood*.

L. C. J. Holt. Pray take the Evidence right: First, What will you make an Overt-Act? What do you think when there is a Debate among divers Persons about killing the King?

Sir B. Shower. With Submission that will be no Overt-Act if there be a Debate of such a matter, tho he be present.

L. C. J. Holt. Aye; but when there is a Consult, and upon Debate a Resolution is formed, and tho he does at first dislike it, yet when he is told he must command a Party, he says he is content, or there's an end of it; What do you make of that?

Sir B. Shower. He said he did not like it, it was a barbarous desperate Design,

L. C. J. Holt. It's true, but when *Sir George Barclay* said he shou'd command a Party, he acquiesced, and said there was an end of it: there was a Discourse about cutting off the King, and that was agreed upon in the Company at that time; and tho at first he did not like it, yet he might afterwards agree to it.

Sir B. Shower. My Lord, that is it which we deny; we say there is no proof of his Agreement to it.

L. C. J. Holt. *Capt. Porter* says, he did declare that he said he look'd upon it as a desperate Design, and was averse from being engag'd in it, but afterwards did agree to it; Whether that is not such an Overt-Act as is laid in the Indictment?

Sir B. Shower. My Lord, We must beg leave for the Prisoner in a Case of this Nature, that it may be recollected what the Evidence did say. *Mr. Porter* did not take upon him to affirm that *Mr. Rookwood* consented to it, but only said there was an end of it: Now we must leave that to the Jury, what they can make of such a Doubtful Expression.

L. C. J. Holt. Call *Mr. Porter* in again.

Mr. Conyers. My Lord, the first Meeting *Mr. Porter* speaks of, where the Prisoner *Mr. Rookwood* was, is at the *Globe Tavern*, where this Discourse was; the next Meeting that he speaks of, was on the Friday Night, before the first Saturday when the Business was to be done, and afterwards he met at *Porter's* Lodgings, on Saturday Morning, in *Ryder street*.

Then Capt. Porter come in again.

L. C. J. Holt. Hark ye *Mr. Porter*, the first time that this Matter was proposed, when *Mr. Rookwood* was present, you say was at the *Globe-Tavern*.

Capt. Porter. Yes, my Lord, it was.

L. C. J. Holt. And you say he dislik'd it, and did not care to be concern'd in it.

Capt. Porter. Yes, my Lord, he did so.

L. C. J. Holt. Well, What said *Sir George Barclay*.

Capt.

Capt. Porter. — *Sir George Barclay* said he ought to obey his Orders, for he had such a Commission for such a thing, and he drew out a Scheme how it was to be done; and when *Sir George Barclay* told *Mr. Rookwood* he shou'd Command his Party, he replied in *French* there's an end of it.

L. C. J. Holt. This was at the *Globe-Tavern*, Was it not?

Capt. Porter. Yes, my Lord, it was.

Mr. At. Gen. Pray then, *Capt. Porter*, let me ask you another Question, Was he afterwards with you at any other meeting, and when and where?

Capt. Porter. He was with me upon Saturday the 15th, at my Lodging in *Little Rider-street*, where was *Sir George Barclay* and others.

Mr. At. Gen. What Discourse happen'd then, I pray?

Capt. Porter. They did there discourse the whole Matter, and *Sir George Barclay* was not for going at that time, because there was so many People that went with the King; that there wou'd not be a good Opportunity to effect the Design: but I told him they wou'd go off after the Hunting was over, and so it was agreed upon to go on with the Undertaking.

Mr. At. Gen. Pray, at that time did *Mr. Rookwood* pretend to dislike the Affair, or refuse to be any way at all concern'd in it?

Capt. Porter. No, my Lord, I can't remember that he spoke one word.

L. C. J. Holt. Was *Mr. Rookwood* there?

Capt. Porter. Yes, there was *Mr. Rookwood*, *Sir George Barclay* and *Mr. Durant*.

Mr. At. Gen. And had you discourse at that time about this Business?

Capt. Porter. Yes, my Lord, there was that Objection made of so many People going with the King, and I made that Answer that I tell you.

L. C. J. Holt. Why then, suppose at the *Globe-Tavern*, such an Expression had not dropt from the Prisoner, but a Man is present at two Consults that are held about the Death of the King, but says nothing either at the first or second, What wou'd you make of that Case?

Sir B. Shower. My Lord, I confess this is a Case of a very barbarous Nature, of which I hope my Client will acquit himself: but I think we have the Authority of Parliament on our side, that this does not amount to a proof of Treason. It seems they lay a stress upon this, that *Mr. Rookwood* came to *Captain Porter's* Lodgings on the Saturday Morning the 15th: but then take the Case as it is; for ought that does appear upon the Proof, he knows not upon what account the Meeting is before-hand. I think that is the Case of my Lord *Russel*, upon which the Reversal of his Attainder went, that the Evidence came short, and that it was but Misprision; for the Evidence was, that he was present at the supposed Declaration's reading, but said nothing at all to it.

L. C. J. Holt. But I speak of two Meetings; there was but one.

Sir B. Shower. My Lord, I do not know whether there were two Meetings or one then: but this is the ground we go upon, there ought to be two Witnesses: and if there be two Meetings upon such a Design, the second may be is accidental, and it does not appear to be a design'd Meeting; and there was no Appointment of *Mr. Rookwood* to be there, nor any Negotiation by way of Message or otherwise, to that purpose.

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Is this, my Lord, an Overt-Act? Suppose a man be present at a Consult about Treasonable Practices, and he uses words that are indifferent; it is true, in the case of a Wager it amounts to an Assent, but it hardly will come to that when People meet by accident, or for they don't know what.

L. C. J. *Holt*. How is this by accident?

Sir B. *Shower*. It does not appear that it was by Design or Appointment.

L. C. J. *Holt*. They were Acquaintance.

Sir B. *Shower*. He had no acquaintance with him but in Sir George Barclay's company.

L. C. J. *Holt*. But besides, there was an express Consent at the *Globe-Tavern*, when *Rookwood* said there's an end of it.

Sir B. *Shower*. That is as much as to say, I will not do it, I will not go with you —

Mr. *Soll. Gen.* Sir George Barclay was the Person whom they were to obey; and *Harris* tells you, he told them what they were to do, and six Horses were first plac'd, and three of them afterwards remov'd.

Sir B. *Shower*. That won't affect him what Sir George Barclay said, any more than *Lewis's* appointing of the Horses.

L. C. J. *Holt*. Then there is another thing, Why did he give a List to Mr. *Harris*? the List that was given had Mr. *Rookwood's* Name at top, as he was to command the Party, and there was *Harris's* Name and *Hare's* Name as of his Party; that is, their feign'd Names; Mr. *Rookwood's* feign'd Name was *Roberts* that was at top, and they were to go to *Turnham-Green*, and *Rookwood* told *Harris*, he shou'd be his *Ayd du Camp*.

Sir B. *Shower*. My Lord, for that I think we have a point of Law, that we apprehend will turn off all that Evidence, and sure we may take that Exception now: The words of the Act are, That no Evidence shall be given of any Overt-Act that is not expressly laid in the Indictment. Now cannot I shew upon this Indictment, that there is no Overt-Act in such a positive direct manner as they now urge about this List. Will not that satisfy your Lordship's Judgment to set aside all this Evidence? To make the Indictment good for Treason, there ought to be a Compassing of the Death of the King laid, and an Overt-Act laid declaring that Compassing; but no Evidence is to be given of any Overt-Act that is not laid in the Indictment.

L. C. J. *Holt*. You are not to take Exceptions to the Indictment now, but only to the Evidence.

Sir B. *Shower*. I have this one Exception more; there is never a *Quodque* nor a *Juratores ulterius presentant*.

L. C. J. *Holt*. There does not need; but that is a Fault, if any, in the Indictment, and is not to be stirr'd now.

Sir B. *Shower*. If there be not a Presentment by the Jury, then there is no Overt-Act alledg'd: and if there be no Overt-Act alledged, or no such Overt-Act, then we are within the Words of the Act, that no Evidence shall be given of any such Overt-Act but what is alledg'd; and it is, if not expressly alledged, as if it were not alledged at all: now here it is very loose, & *iidem Christopherus Knightley*, and so it goes on with the rest, did so and so. There is a Presentment at first, that they did Compass and Imagine the Death of the King; and then the Indictment comes farther, and says, that 40 men shou'd do this Business, and of those 40 these 4 shou'd be some; and then the *iidem* bought Horses and Arms, and so it must go to the last Antecedent, and then there is no express alledg-

ing of any Overt-Act, and then it is as if no Overt-Act at all was alledg'd.

L. C. J. *Holt*. This Exception is not to the Evidence, but to the Indictment: it begins, *Juratores presentant quod*; Does not that relate to all?

Sir B. *Shower*. No, my Lord; and I can tell you a Reason why not: if it be not so well alledged as it shou'd be, it is in an Indictment as if it were never alledged at all: and so within the Words of the Act of Parliament this is not an Overt-Act alledg'd, and therefore they cannot give Evidence upon it.

Mr. *Soll Gen*. Truly, my Lord, I can't imagine what they are doing, they are moving in Arrest of Judgment before a Verdict given: they say the Overt-Act is not expressly laid; Is that an Exception to the Evidence or to the Indictment?

Sir B. *Shower*. If my Lord will please to give us the Liberty, we wou'd shew there can be no Verdict given upon this Indictment.

L. C. J. *Holt*. Certainly this is an irregular Proceeding; this is not a time of Exception to the Judgment.

Mr. *Phipps*. Then, my Lord, we are in your Judgment, as to the Proof that has been given: If a man be present at a meeting of several Persons, and there is a Treasonable Debate about Killing the King, and this man is only present, but neither assents, nor makes the Proposal how it shall be done, whether the bare being silent, and saying nothing, is such an Overt-Act as shall Convict a man of Treason?

L. C. J. *Holt*. I tell you, Consenting to a Traiterous Design is an Overt-Act of High-Treason, if that Consent be made to appear by good Proof: Now the Question is, What is a good Proof and Evidence of this Consent? a man is two or three times at a Treasonable Consult for Killing the King, and tho perhaps at the first he did not, yet at the second he did know that the Meeting was for such a Design, (suppose for the purpose there was but two Meetings) and at the second it is determined to go on with the Design; Is not that an Overt-Act, tho it cannot be proved that the Prisoner said any thing?

Mr. *Phipps*. If the first Meeting is not a Consent, or an Overt-Act, neither will a second or third be if there was no more done than at the first, but they are like so many Cyphers without a Figure.

L. C. J. *Holt*. The first Meeting possibly might be accidental, he might not know what it was for, tho that will go a great way if he does not dissent or discover; but then he meets again with the same Company knowing what they had in Design, Does not that prove a Consent? That was the Case of Sir *Everard Digby* in the Powder-Plot.

Mr. *Phipps*. But where it may be uncertain, my Lord, whether it were with a good Design or a bad Design that he met with that Company, it ought to be taken most favourably for the Prisoner: this man might be present in order to a Discovery.

L. C. J. *Holt*. But besides, that is not this Case: you are mooving upon Points that are not in the Case. When Mr. *Harris* came to Mr. *Rookwood*, and finding them in some Disorder, and being inquisitive what was the Occasion, he was sent to Counter; and when he discovered what they were to go about, he afterwards meeting Mr. *Rookwood*, says to him, Are we sent over to murder the Prince of *Orange*? says *Rookwood*, If I had known of this Design before I came from *France*, I wou'd have begg'd the King's, that is, King *James*, Pardon, and desired to have been excused. Hereby he expresses his Knowledge of the Design, and what he was to do; and tho he disliked, yet wou'd obey Orders. Mr.

Mr. Phipps. There is no doubt, my Lord, but he knew of it; but whether your Lordship will construe his Silence as a Consent, in Treason, is the Question.

L. C. J. Holt. A man is at frequent Consults about Killing the King, and does not reveal it, it is a great Evidence of his Consent.

Mr. Phipps. But it is not prov'd that he did actually Consent to it.

Mr. Soll. Gen. My Lord, we must submit it to your Lordship, whether this is not totally improper and irregular at this time; they are arguing how far the Evidence is to be believ'd, before the time proper for such an Argument comes.

Mr. At. Gen. If they will call their Witnesses, let them; or if they say they have none, then they may make their Observations upon the Evidence; but else we desire we may be kept to the usual method of Proceedings.

Mr. Phipps. With Submission, we thought it fit to know the Opinion of the Court first, if there be two Witnesses against the Prisoners; for if there be not two Witnesses, as the Law requites, we need not trouble the Court with our Evidence.

Sir B. Shower. Then, my Lord, we must desire that the Record may be read of Captain *Porter's* Conviction of Manlaughter: a man that has been guilty of doing such an Act, feloniously, maliciously, and voluntarily, as that is sure, is not a competent Witness.

Cl. of Arr. It has been read already.

Mr. Att. Gen. I thought we had been over that Objection before.

Sir B. Shower. We think it is proper for us to move it now again; for tho' it is no Objection to his being a Legal Witness, yet we hope it will influence his Reputation as to his Credit; for he that has been guilty of killing a man in such a manner as the Indictment lays it, will find but little Credit, we hope, with a Jury of Countrymen. But since it has been read, and your Lordship and the Jury have taken notice of it, we will call some other Witnesses as to *Mr. Porter's* Reputation and Behaviour, we think they will prove things as bad as an Attainder. I shall not open them to your Lordship, but beg leave to call our Witnesses, who will acquaint you what they have to say,

Mr. Att. Gen. Certainly, my Lord, you will not think fit to let them do so. I desire they wou'd not utter in any thing of Evidence without acquainting the Court what they call them for: for that were the way to let them in to call Witnesses to things that are not proper.

L. C. J. Holt. Nay, without doubt it is not regular to produce any Evidence, without opening it.

Mr. Att. Gen. For if it be for any Crime that a man may be presented for, and there is no Conviction, I think that ought not to be given in Evidence to take away a Witness's Credit; if it be only to his general Reputation and Behaviour, so far they may go, and we can't oppose it. Therefore I desire *Sir Bartholomew Shower* will open to the Court of what nature his Evidence is.

Sir B. Shower. Well, I will tell you then what I call them to.

L. C. J. Holt. You must tell us what you call them to.

Sir B. Shower. Why then, my Lord, if Robbing upon the Highway, if Clipping, if Conversing with Clippers, if Fornication, if Buggery, if any of these Irregularities, will take off the Credit of a man, I have Instructions in my Brief of Evidence, of Crimes of this nature, and to this purpose, against *Mr. Porter*; and we hope that by Law, a Prisoner stand-

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ding for his Life is at liberty to give an Account of the Actions and Behaviour of the Witnesses against him. I know the Objection that Mr. Attorney makes, a Witness does not come prepared to vindicate and give an account of every Action of his Life, and it is not commonly allowed to give Evidence of particular Actions; but if those Actions be repeated, and a man lives in the Practice of them, and this Practice is continued for several Years, and this be made out by Evidence; we hope no Jury that have any Conscience, will upon their Oaths give any Credit to the Evidence of a Person against whom such a Testimony is given.

Mr. Phipps. We are speaking only, my Lord, to the Credit of Mr. Porter, and if we can shew by Evidence that he is so ill a Man as to be guilty of those Crimes that we have open'd, according to the Instructions in our Brief; we hope the Jury will not think him fit to be a good Evidence against us in this Matter.

L. C. J. Holt. What say you to this, Mr. Attorney.

Mr. At. Gen. My Lord, they themselves know that this sort of Evidence never was admitted in any Case, nor can be, for it must tend to the Overthrow of all Justice and Legal Proceedings; for instead of trying the Prisoner at the Bar, they would try Mr. Porter. It has been always deny'd where it comes to a particular Crime that a Man may be prosecuted for, and this it seems is not one Crime or two, but so many and so long continued as they say, and so often practised that here are the whole Actions of a man's Life to be ript up, which they can never shew any Precedent when it was permitted, because a man has no Opportunity to defend himself; any man in the World may by this means be wounded in his Reputation, and Crimes laid to his Charge that he never thought of, and he can have no Opportunity of giving an Answer to it, because he never imagined there would be any such Objection: It is killing a man in his good Name by a Side-wound, against which he has no Protection or Defence. My Lord, this must tend to the preventing all manner of Justice; it is against all common Sense or Reason; and it never was offered at by any Lawyer before, as I believe, at leastwise never so openly, and therefore I wonder that these Gentlemen should do it, who acknowledge, at least one of them did, that as often as it has been offered it has been over-ruled; and I know not for what end it is now offered, but to make a noise in the Court: they know that it is irregular as much as any thing that could be offered.

Mr. Soll. Gen. Indeed, my Lord, if the Prisoner at the Bar had offered this matter it had been excusable; but that Gentlemen of the Long Robe, and who are so well acquainted with the Practice of the Courts of Law, should pretend to do such a thing, is unaccountable. There was somewhat like this that was offered at *Manchester*, but that was by the Prisoner, to prove that one *Lunt* who was a Witness had two Wives, and they brought a Copy of an Indictment upon which there was no Process; after that they endeavoured to prove him guilty of several Robberies: but all that sort of Evidence was refus'd. I only give them this Instance to shew, that where the Prisoner has attempted it, it has been always rejected: and I am sure they cannot shew me that ever it was allow'd even to the Prisoner himself to give any thing of this kind in Evidence; and this I must say, they can never shew me any one particular Instance when Counsel ever endeavoured to do it before this time.

Sir B. Shower. My Lord, I mentioned the particular Crimes, the Faults which I had in my Instructions to object against the Credit of the Testimony of Captain *Porter* in Answer to Mr. Attorney's desire, that I would open the particulars of the Evidence, that I would call my Witnesses to the truth of it; I was loth to repeat the words, I think the things themselves so abominable, but we conceive with submission, we may be admitted in this case to offer what we have offered. Suppose a man be a common Lewd disorderly fellow, one that frequently Swears to falsehood for his life: We know it is a common Rule in point of Evidence, that against a Witness you shall only give an account of his Character at large, of his general Conversation; but that general Conversation arises from particular Actions, and if the Witnesses give you an account of such disorderly Actions repeated, we hope that will go to his Discredit, which is that we now are labouring for, and submit it to your Lordships opinion whether we may not do it.

L. C. J. H. Look ye, you may bring Witnesses to give an account of the General Tenour of his Conversation, but you don't think sure that we will try now at this time, whether he be guilty of Robbery or Buggery.

Sir B. Shower. My Lord, we will give you an account that he us'd to have a private Lodging, and come in with his Horse tid'd and several other such things, as that he us'd to go out in Disguises, and the like.

Mr. Phipps. My Lord, I cannot imagine why a man that has been Guilty of any such Crimes and is not taken should be of greater Credit than a man that has been taken and punish'd.

L. C. J. H. What is that you say, Mr. Phipps?

Mr. Phipps. My Lord, I say 'tis the Crime that renders a Man infamous, and I do not know why a man that has had the good fortune not to be taken and punish'd for great Crimes by him committed, should be in a better Condition as to the Credit of his Testimony, then one that is taken and undergoes the punishment of the Law.

Mr. Sol. Gen. Mr. *Chernock* urg'd that as far as it wou'd go, but we are oblig'd it seems, to hear things that have been Over-ruled over and over; but I desire to know of them, whether they can show he has been Guilty of a greater Crime than he has confest himself Guilty of in Court. I mean of the intended Assassination.

Mr. Phipps. No we agree we can't, but pray let us prove him Guilty of as many Crimes as we can.

Mr. Sol. Gen. But, my Lord, I hope you'l keep them to the general Question of the Common ordinary Tenour of his Conversation.

Sir B. Shower. Call Mr. *Oldfield*, Mr. *Nichols*, Mr. *Milford*, *Black Will*.

(Mr. *Milford* appeared.

Cryer. Lay your hand on the Book. The Evidence that you shall give on behalf of the Prisoner at the Bar, shall be the Truth, the whole Truth, and nothing but the Truth, So help you God.

Sir B. Shower. Pray will you give my Lord and the Jury an account whether you know Capt. *Porter* and how long you have known him.

Milford. I have known him about 4 year.

Sir B. Shower. What Reputation is he off?

Milford. I never knew any hurt by him in my life.

Sir B. Shower. Pray what is your name?

Milford. Frederick Milford.

Sir B. Shower. But the name in my Brief is *John Milford*, that is my man.

L. C. J. H. But you see this man knows him.

Sir B. Shower. Call *Mr. Oldfield*.

(Which was done, and he appeared accordingly.)

Mr Phipps. Do you know Capt. *Porter*.

Oldfield. Yes I do.

Mr. Phipps. How long have you known him?

Oldfield. I believe about twenty Years.

Mr. Phipps. Pray will you give my Lord and the Jury an account of his Life and Conversation.

Oldfield. I can say nothing, he was always Civil in my Company, but he was Lewd in his Discourse.

Sir B. Shower. What do you mean by being Lewd in his Discourse?

Oldfield. Why he wou'd be talking very extravagantly.

Mr. Phipps. What do you mean in talking, was it of what he had done himself, Sir?

Oldfield. No otherwise then that he had Whor'd and those kind of things.

Sir B. Shower. What other things beside Whoring?

Oldfield. I Know no other part of it.

Sir B. Shower. Where is *Edward Bowcher*?

(He did not appear.)

Mr. Phipps. Call *William O Bryan*.

(He did not appear.)

Sir B. Shower. Where is *Mr. Page* and *Mr. Hardiman*?

(None of them appeared.)

Cryer. There is not a man of them here, Sir.

Sir B. Shower. *Mr. Webber*, Do you know where they are for the Court stays for them.

Mr. Webber. Indeed I do not, they wete summon'd to be hear.

Sir B. Shower. Where is *Black Will*?

Cryer. *Black Will*.

(He appeared and was a Moor.)

L. C. J. H. Ask him if he be a Christian.

Cryer. I have ask'd him, and he says he's a Christian.

Sworn.

(Then he was sworn.)

L. C. J. H. Well what do you ask him.

Rookwood. Will, Pray give an account of your Master, and of his Life and Conversation.

Mr. Phipps.

Mr. Phipps. You are sworn to tell the Truth, Sweet-heart.

Will. I serv'd him almost 8 Years, and he has been a very good Master to me, my Lord.

Sir B. Shower. But what do you know him to be guilty of.

Will. Nothing at all.

Sir B. Shower. I believe they have put in these Men to confirm his Reputation.

L. C. J. H. Indeed, I think the King's Council should have called these Witnesses if there had been occasion.

Sir B. Shower. We submit it to your Direction, how far this Evidence will affect him there is nothing said, as we apprehend that will amount to Treason: If the Prisoner has a mind to say any thing himself, we hope your Lordship will please to hear him.

L. C. J. H. Ay, if he will, let him.

Rookwood. My Lord, Mr. Porter does not say, that I consented to Command any Party.

L. C. J. H. Is that all you have to say? Then, Gentlemen, will you sum up.

Mr. Conyers. My Lord, we are agreed, we submit to the Court on both sides.

L. C. J. Holt. Then, Gentlemen of the Jury, the Prisoner at the Bar, Mr. Rookwood is Indicted for High-Treason, in Compassing, Imagining, and Intending the Death and Destruction of the King, by a most Barbarous and Wicked Assassination; you have had an Account of this Design from two Witnesses that have been produced, the one is Captain Porter, and the other is Mr. Harris, who swear they were concerned as Actors in it.

Captain Porter tells you, about the latter end of *January* or the beginning of *February* last, Sir George Barclay came over into *England* from *France*; and there was a formed design to Murder the King; and after several Meetings and Conferences among the Conspirators, they came to a Resolution that he should be Assassinated; but which way to effect it admitted of a Dispute among them, for the King, as you have heard going frequently, about once a Week a Hunting, on the other side the Water near *Richmond*, the Design was first to Assassinate him at *Richmond-Park*, or thereabouts, as he returned from Hunting, and Preparation was made accordingly; but that not being so fully agreed upon, the Conveniency of the Place held still some Debate, for some were of Opinion, that it was better to make the Attempt on this side the Water, than on the other; therefore as Mr. Porter tells you, to determine that Difficulty, there were several Men sent, whereof he was one, *Knightley* another, and *King* a Third, to view the Ground on both sides the Water, and to make their Report, the Ground being View'd and the Report made to some of their Accomplices, who to receive it met at the *Nagg's-Head* in *Covent-Garden*, which was about the Tenth or Twelfth of *February* last; It was then agreed, that the King and his Guards should be attack'd on this side the Water about *Turnham-Green*.

Mr.

Mr. *Porter* has told you, that at several Meetings for the carrying on this Design, the Prisoner Mr. *Rookwood* was present, more particularly at the *Globe-Tavern* in *Hatton-Garden*, where were also Sir *George Barclay*, Mr. *Chernock*, Sir *William Parkins*, himself, and others, and there they did enter into a Consult how they might Assassinate the King; and it being proposed, Mr. *Rookwood* did not like it, as Mr. *Porter* says, but said it was a Desperate Attempt, and thereupon Sir *George Barclay* pulled out a Scheme that he had and shew'd it at that time to Mr. *Rookwood*, and said you are sent over from *France* and are to Obey my Orders, and you are to Command a Party, and then Mr. *Rookwood* made an Answer in French, there's an end of it, which, as he says, Imports a Consent.

Then at another time, which was the *Saturday Morning* the 15th of *February*, they met at Captain *Porter's* Lodging, and there was a Discourse about going on to put the Design in execution, and one *Durans*, one of the Men that was to watch the King and the Guards going out at *Kensington*, came in, and the Question was, whether they should go that Day upon the Design; they had Discourse about it, and Mr. *Rookwood* the Prisoner was there present, and there did not appear any Dissent in him to the Prosecution of the Design, but it seem'd it was readily agreed among them, to pursue it according to the former Determination.

Then the next Witness that is produc'd is M. *Harris*, who gives you a large Account of the beginning of his Knowledge and of his being concern'd in this matter; He tells you, he was in *France*, and at the Court of *St. Germain's*, where the late King then was, and that he spoke with him, and where was also Colonel *Parker*, and King *James* took notice of him and of his Faithful Service, and told him, he always design'd him a Kindness, and then had Opportunity of doing it, and said he would send him over into *England*, where he should be subsisted, and directed him to obey the Orders of Sir *George Barclay*, and there being one *Hare* by, who was to come over with him, King *James* gave them both Names of Disguise which they were to go by in *England*, and as it seems, others that came over did also assume, for Mr. *Rookwood* went by the Name of *Roberts*, *Harris* was to go by the Name of *Jenkins*, and *Hare* by the Name of *Guiny*; they were directed to apply themselves to Sir *George Barclay*, and had directions how they should find him, which were to go into *Covent-Garden* in the Evening, upon a *Monday* or a *Thursday*, and if they saw a Person that had a White Handkerchief hanging out of his Pocket, they were to take notice of him to be Sir *George Barclay*, and they had Ten *Lewis d'Ors* a-piece for their Journeys to carry them off, and you have heard from whom they had them; and they were told, that if at *Calais* they were kept longer then they expected, whereby their Money was spent, care was taken that they should be supplied from the Governor of *Calais*, the President there; and it seems Mr. *Harris* and Mr. *Hare* went together to *Calais*, and lay a considerable time for want of a Wind, whereby their Money fell short of defraying their Expences, but they were afterwards supplied by the Governor of *Calais*, according as was promised at *St. Germain's*.

Gentlemen,

Gentlemen, he tells you, that after they came into *England*, the first time they went to seek *Sir George Barclay*, was upon the *Monday* Night, but they did not find him at that time, but afterwards they met with him, and *Mr. Harris* had Subistence-Money from him, according to *King James's* Promise, which was at the rate of 5 s. a Day when he had no Horse, and afterwards when he had a Horse at 6 s. a Day; this is the Account he gives you how he came over, and of his Journey and meeting with *Sir George Barclay*.

And now he comes to speak particularly concerning the Prisoner at the Bar, *Mr. Rookwood*: He tells you, that on *Saturday* morning the 15th of *February*, the first day when this Assassination was designed to be committed, he went to the Lodging of one *Burk*, where *Mr. Rookwood* was, with others, and he found them all in great Disorder; and and thereupon he ask'd them, What was the matter, and what they were going to do? And *Rookwood* bid him go to one *Counter*, and he should know of him what was the matter: Accordingly he went to his Lodging, and *Counter* told him and those who were with him, That they must get ready to go to *Turnham-Green*; and at the same Time and Place he met with *Sir George Barclay*, and after some Discourse of Attacking the Coach, *Sir George Barclay* at the first said, They were his Janizaries; and afterwards going out, he came in again and said, They were Men of Honour, and that they were to go abroad to attack the Prince of *Orange*.

The next day, or a little time after, *Mr. Harris* met with *Mr. Rookwood*, and enters into Discourse with him to this effect: What! are we sent over to murder the Prince of *Orange*? It is a strange sort of Employment, (for it seems they were not informed in *France* what they were to do here, but they were only to put themselves under the Conduct of *Sir George Barclay*, and obey his Orders:) *Mr. Rookwood* said, He was afraid the Thing was so, and that they were drawn in; but said, If he had known of the Design before-hand, he would not have come over, but have begg'd the King's Pardon. Which shews not only his Knowledge of the Design, but his being Engaged in the Prosecution of it.

And then, Gentlemen, you are told further, That upon the going out upon *Saturday* the 22d, which was the second time it was to have been put in Execution, there was a List of Men that *Mr. Rookwood* gave to *Mr. Harris* of several Names that he has mention'd to you; he says, *Mr. Rookwood's* Name was at the top, as one that was to Command the Party, and the Name he went by was *Roberts*; and there was *Harris's* Counterfeit Name, which was *Jenkins*; and *Hare's* Counterfeit Name, which was *Guinea*; and they were to make ready to go to *Turnham-Green*. He told him, There was the List, and that he and *Harris* was to be of his Party, that he was to attack the Prince of *Orange*, and that *Mr. Harris* should be his Aid-du-Camp.

Gentlemen, I forgot to tell you, That between the first *Saturday* and the second, *Mr. Harris*, *Mr. Rookwood*, and *Mr. Lowick*, walking in *Red-Lion Fields*, and there in Discourse among themselves, *Mr. Harris* and *Mr. Rookwood* did express themselves to be much concerned that they were to be imployed upon such a Design as this was, which they owned to be very barbarous; but *Mr. Rookwood* and *Lowick* said, They were under Command, and must obey Orders, tho *Mr. Rookwood* did not like the Design they were Engaged in.

Gentlemen, they have told you of Horses that were placed at *Somerſet-houſe* in a Stable there, under the Care of *Mr Lewis* my Lord *Fewerſham's* Gentleman of the Horse, about six or seven Horses, and those six Horses that were there at that time were afterwards taken away; but that is only a Circumſtance.

So that, Gentlemen, this is now the Sum and Substance of this Evidence that has been given you as far as it relates to the Prisoner; his Council in his Defence have insisted upon several Things in the first place, tho it was last mentioned in Time, yet it ought to have the first Consideration: The Council for the Prisoner have endeavoured to take off the Credit of *Mr. Porter*, and have opened indeed very great Crimes that he should be guilty of, which must render him a Person not to be believed, but they have not proved any thing; no Witness that they have called against *Mr. Porter* says the least against him to Invalidate his Testimony, or to induce you to Disbelieve what he has said.

Then they say in Point of Law, There is no Overt Act proved of any Design against the King's Life that affects *Mr. Rookwood*; now that Matter you are to consider of, Whether or no it does not appear by the Testimony of two Witnesses, that *Mr. Rookwood* was Concerned in this Design of Assassinating the King; *Capt. Porter* is positive that he was at the Consult at the *Globe Tavern*, where it was Proposed, Debated, and Resolved upon; but *Mr. Rookwood* says, he did Dislike it; so says *Captain Porter*, he did not Approve of it at the first upon his being Acquainted with it; but being sent over to obey the Orders of *Sir George Barclay*, and *Sir George Barclay* producing a Scheme ready drawn, wherein he was to Command the Party, telling him, That he must obey Orders. You hear what he said, and the Answer he return'd in *French*, There's an end of it; Whether that does not amount to a Consent and Agreement to be Engaged in this Design, is left to your Consideration, for if it do, it is plainly an Overt Act.

Then Gentlemen, you hear further that *Harris* was told by *Mr. Rookwood*, that he should be of his Party, and be his *Ayd du Camp*, and go to *Turnham-Green*, to Attack the Prince of *Orange*, and he had a List of Men given him by *Rookwood*, and was directed to get the rest ready.

Rookwood. That was not in the Indictment.

L. C. J. Holt. But you were at that meeting, which is laid in the Indictment.

Rookwood.

Rookwood. My Lord, that List is not in the Indictment; the List in the Indictment refers to Mr. *Cranburn*.

L. C. J. Holt. No, but that is an Evidence of your being in the Design, I hope that List of Men will be some Evidence of the Consent and Agreement that Mr. *Rookwood* was to Command a Party.

Sir B. Shower. With submission, my Lord, the words of the Act seems otherwise, and that no Overt Act should be given in Evidence, that is not expressly Alledged.

L. C. J. Holt. But cannot there be one Act, that they be Proof of another Act which is Alledged.

Sir Bar. Shower. Then there is no Advantage of this Law; for my Lord, the end of the Act was That they should know the particular Crimes that they were to answer to.

L. C. J. Holt. That could never be the end of the Law, that all particular Facts that are but Evidence of the Facts Alledged should be set forth in the Indictment, it was sufficient before the Act, to Alledge any Overt Act, and any other Overt Act, tho not Alledged, and had no Relation to the Overt Act that was Alledged, yet if it were to the same sort of Treason, might be given in Evidence.

Sir B. Shower. The Law says, ye shall not give Evidence of any Overt Act that is not expressly mentioned.

L. C. J. Holt. It is not urged as an Overt Act, but as Evidence of an Overt Act that is Alledged; For instance, the Overt Act Alledged, is that they did Meet and Consult, shall not they give in Evidence what was said and done at those Meetings, tho not Alledged. Sir *George Barclay* produced a Scheme at the *Globe Tavern*, shall not the producing of that Scheme be given Evidence, if it may, why not the giving the List to *Harris*.

Mr. Phipps. My Lord, it is plain it was Mr. *Attorneys* Opinion, it could not be given in Evidence, unless it were Alledged in the Indictment, because he has particularly Alledged the List in *Cranburns Case*, in this very Indictment.

Mr. Sol. Gen. I know not what those Gentlemen mean by this sort of Practice, certainly there never were so many Irregularities Committed in any Tryal as in this, and now particularly to break in upon the Court, in the midst of the Charge.

L. C. J. Holt. Nay, nay, if there be any mistake, let us hear them, that it may be rectified.

L. C. J. Treby. I think we should receive 'em, to try if they can make it out. But the Objection I do not very well understand yet, for, as I take the matter to stand, it is Alledged in the Indictment, that they had prepared Men, and Arms, and Horses, for the Execution of this Design. Now is it not reasonable, or can there be any thing more proper, then to
give

give in Evidence, and prove that the Prisoner had, and delivered to some of the Complices, a List of those Men that were to do it. Why, it proves the very thing Alledged, but let us see whether it be so?

Sir B. Shower. My Lord, there is no such thing Alledged.

L. C. J. Holt. That is strange, pray see if it be not in the Indictment.

Clerk of Arraignment. (Reads.) *Conveniebant proposuerunt Tractaverunt Consultaverunt Consenserunt & Agreaverunt ad Ipsum Dominum Regem nunc ex Insidiis & Dolo percutiendum Anglice to Assassinate Interficiendum & murdrandum & ad execrabilem Horrendum & Detestabilem assassinationem Anglice Assassination & Interfectionem illam Citius exequendum & perpetrandum postea Scilicet eisdem Die & anno ac Diversis aliis Diebus & Vicibus apud parochiam prædictam in Comitatu prædicto proditorie tractaverunt proposuerunt & Consultaverunt de viis modis & mediis ac tempore & Loco ubi quando Qualiter & quomodo Dictum Dominum Regem sic ex insidiis facilius interficerent & Consenserunt Agreaverunt & Assenserunt quod quadraginta Homines equestres aut eo Circiter quorum iidem Christophorus Knightley, Robertus Lowick, Ambrosius Rookwood, & Carolus Cranburne forent quatuor & qui libet horum proditorie super se suscepit esse anum cum Bombardis Sclopis & Sclopetis pulvere Bombardico & Globulis plumbeis onoratis & cum Gladiis ensibus & aliis Armis Armati Insidiati forent & essent in subfessu Anglice in Ambush ad eundem Dominum Regem in Rheda sua Anglice his Coach existentem quando foris iret invadendum quodque quidam & Competens numerus de Homnibus illis sic Armatis in Satellites Anglice the Guards Ipsius Domini Regis eum tunc attendentes & secum existentes Agressi forent & eos expugnarent & devincerent Dum alii eorundem Hominum sic Armatorum Ipsum Dominum Regem percuterent Interficerent Occiderent & Murdrarent.*

Mr. Conyers. And my Lord, there is Evidence of some of these 40 Men, whose Names were given in a List, by *Rookwood* to *Harris*.

Mr. Phipps But now in *Cranburne's* part, the List is expressly Alledged as an Overt Act.

L. C. J. Holt. Never talk of *Cranburne*, we have not him before us now, but what do you say to this of the List given by *Rookwood* to *Harris*.

Sir B. Shower, My Lord, we say this is not Evidence of an Overt-Act, according to this Act of Parliament ; which says, No Evidence shall be given of any Overt-Act, that is not expressly alledg'd in the Indictment ; now the Indictment says, they did agree that Forty Horsemen Armed, of which the Four named were to be Four, and every one undertook to be one, who shou'd lie in wait to set upon the King in his Coach, and a Competent number should set upon the Guards ; and then it says, in order to fulfil this, they did prepare Horses and Arms, and one of them by the Consent of all the rest, did carry forward and backward a List, that is, *Cranburn* ; and that particular List is a particular Overt-Act alledged in the Indictment, which makes it plain, they thought it necessary to be particularly alledged by this Act of Parliament, or they could not give any Evidence of it ; now the List that Evidence is given of, is supposed to be delivered by the Prisoner to *Harris*. Now first we say it is not Evidence that Forty shou'd do it, for they may do it without a List, and next it is not Evidence of the List that they have mentioned, for that is alledged to be carried about by *Cranburn*, and as the Prisoner himself has observed, this List given to *Harris* is not in the Indictment, and therefore no Evidence can be given of it.

Mr. Conyers, It is an Evidence of that Overt-Act which is expressly alledged in the Indictment, that they met together to Consult how to effect this Treason.

Mr. Cowper, My Lord, we are in a very strange Case here, if we be not very proper in this part of our Evidence ; the Overt-Act laid, is that the Prisoner met together with others to Consult how to Assassinate the King, and there the Prisoner among the rest did agree it should be done so and so. 'Tis admitted the Prisoner was there. But say they, if you only prove that he sate by while there was a general Discourse of such a matter, but do not prove that he said or did any thing, expressing his Assent, that will not amount to a proof of the Overt-Act laid, and yet, if we go about to prove further, any Act done that manifests his Assent, then they say you go too far, and prove an Overt-Act that is not mentioned in the Indictment : Thus they grant, the agreement is a sufficient Overt-Act, but Object, that being present barely is not a sufficient proof of his Agreement, then when we go to make proof of any thing that is a sufficient proof of his Agreement, they tells us it is not proper upon this Act of Parliament, because not laid in the Indictment, though his agreement be laid in the Indictment, and so they wou'd amuse us, rather than make any solid Objection to our Evidence ; this Doctrine is certainly very odd, my Lord, and we doubt not will have little weight with the Court or the Jury.

Mr. Att. Gen. According to this Doctrine all the Evidence must be put in the Indictment.

L. C. J. Holt, They ask you what this giving this List does prove ?

Mr. Att. Gen. His agreeing at that meeting to the Conspiracy, and the Execution of it, by giving that List of the Names of them that were to be of his party, and his own Name as Commander of that Party, this he gives to one that was to be of the Party, and particularly was to be his Aid, *du Camp*, in order to get them ready for the Execution ; is not this an Evidence of the agreement which is the Overt-Act ? No Man in the World can be Convicted of Treason if this Doctrine be true.

Mr. Soll. Gen. My Lord, they have not exprest something in the Indictment that has been Read, which will make it plain, that this is the most proper Evidence of the Overt-Act laid in the Indictment. The Indictment says they agreed there should be Forty Men or thereabouts Armed, of which a certain number should make an Assault upon the King's Coach. while another part should set upon the Guards: Now the proof we make, is that *Mr. Rookwood* the Prisoner, was to Command a Party that was to set upon the Guards, and in order to it, he gives a List of his Men to *Harris* who was to be his Aid, *du Camp*, and bids him get those Men ready; and this was upon the day that this matter was to be acted, so that it proves very plainly that Overt-Act that we suggest in the Indictment, that a certain number of those Men were to Assault the King's Person, and other part the Guards, and therefore they needed not have interrupted your Lordship; for this List that *Harris* speaks of, is a very good proof of the Overt-Act that is laid in the Indictment.

L. C. J. Holt, Then Gentlemen as to this matter which they have objected, that this List given on the Day of the intended Assassination, ought not to be allowed as Evidence to prove the Treason, because it is not specially laid in the Indictment, but is by the late Act of Parliament excluded from being proved to Convict the Prisoner; now though the Act doth exclude the giving in Evidence any Overt-Act that is not laid in the Indictment, yet it doth not exclude such Evidence as is proper and fit to prove that Overt-Act that is laid in the Indictment: Therefore, the question is, whether this giving of the List does not prove some Overt-Act that is alledged in the Indictment, there is in the Indictment, an Agreement laid to kill the King, and if that be proved, that's an Overt-Act of this Treason; now when the Consent and Agreement of *Mr. Rookwood* to that design is proved, surely the proof of his giving a List of Men is a further proof that he did agree to it, then it is very proper to be given in Evidence, for if by the New Statute no one Act can be given in Evidence to prove another, then must not only the Overt-Act but also the Evidence of that Act be exprest in the Indictment.

Gentlemen, you have heard the Witnesses, what they say concerning this matter. In the first place, if you do believe that there was such Consults and Meetings, where this intended Assassination of the King was Debated and Resolved upon, and that *Mr. Rookwood* was present, and did agree to it; that is an Overt-Act, and again, if you are satisfied that there was an Agreement to prepare and provide a number of Men to set upon the King and his Guards in the manner you have heard, and he was concern'd in making this Provision, and was to have a Post and Command a Party in that Attack, that is a further proof of that Consent and Agreement, that is laid in the Indictment.

Gentlemen, I must leave it to you, upon the Evidence that you have heard; if you are satisfied upon the Testimony of these two Witnesses that have been produc'd, that *Mr. Rookwood* is Guilty of this Treason of which he is Indicted, in Compassing and Imagining the Death of the King; then you will find him Guilty; If you are not satisfied that he is Guilty you will acquit him.

Cl. of Arr. Cryer, Swear an Officer to keep the Jury, which was done.

L. C. J. Holt,

L. C. J. *Holt*, Now if you have any thing to move on behalf of your other Clients pray do it.

Sir B. *Shower*, Yes, we have an Exception, but never a one of false Spelling.

L. C. J. *Holt*, If so be it be any such matter as you can move in arrest of Judgment, it had best be reserv'd till after the Verdict.

Sir B. *Shower*, Our Exceptions will serve if occasion be for Mr. *Rookwood*, in arrest of Judgment; and they will serve for the others also to prevent the trouble of the Tryal, if we have your Lordships Opinion that they are good Exceptions.

Then the Jury withdrew to consider of their Verdict, and after a Quarter of an Hours staying out, Return'd and gave in their Verdict.

Cl. of Arr. Gentlemen, answer to your Names. *Samuel Powell*.

Mr. *Powell*, here.

Cryer, *Vous avez*, and so of the rest.

Cl. of Arr. Gentlemen, are you all agreed of your Verdict?

Jury, Yes.

Cl. of Arr. Who shall say for you?

Jury, Our Fore-man.

Cl. of Arr. *Ambrose Rookwood*, Hold up thy Hand; (which he did.) Look upon the Prisoner. How say you? Is he Guilty of the High Treason whereof he stands indicted, or not Guilty?

Fore-man, Guilty.

Cl. of Arr. What Goods or Chattels, Lands, or Tenements, had he at the time of the Treason Committed?

Fore-man, None to our Knowledge.

Cl. of Arr. Then hearken to your Verdict, as the Court hath Recorded it: You say, that *Ambrose Rookwood* is Guilty of the High Treason whereof he stands Indicted, but that he had no Goods, or Chattels, Lands, or Tenements, at the time of the High Treason Committed, or at any time since to your knowledge, and so you say all.

Jury, Yes.

Mr. *Powell*, We desire we may be Discharg'd.

L. C. J. *Holt*, We cannot do that, till we see whether there be enough upon the other Pannel, we will give you as much ease as we can, we shall not I suppose Try the other till the Afternoon, therefore you may take your ease for the present, but you must be about the Court when the other Tryals come on.

While the Jury was withdrawn, the Court offered to the Counsel for the Prisoners, that they might move what Exceptions they had before the Jury was Sworn as to any of the other: which accordingly they did, but that relating to the Case of Mr. *Charles Cranburn*, in whose presence, being then at the Barr, the Objections were made, that part is left to his Tryal:

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